Microlog Microfiche Collection
Resolution Chart

Copyright

Copyright for the *contents* of this microfiche is held by the publisher of the original document. Please contact the original publisher for guidance in all copyright matters. Copyright in this *microfiche edition* is held by Micromedia Limited.

Quality of the Microfiche Reproduction

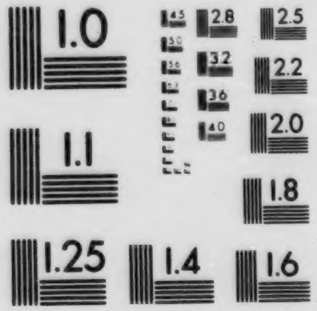
Micromedia Limited maintains the highest standards for micrographic reproduction. Attempts are made to obtain the best quality print version to microfilm. However, there are some printing styles, colours and graphic layout styles (including maps, graphs and tables) which do not reproduce well. Because of the value of the original document, Micromedia has filmed it recognizing that it may not be as easy to read as the original document.

Some pages have been filmed twice to improve the clarity of the reproduction. Consult both reproductions to ensure that all of the original text is read.

Microcopy Resolution Test Chart
National Bureau of Standards
Standard Reference Material 1010a
(ANSI and ISO Test Chart No. 2)

0 mm
10
20
30
40
50
60
70
80
90
100

PM-1 3½"x4" PHOTOGRAPHIC MICROCOPY TARGET
NBS 1010a ANSI/ISO #2 EQUIVALENT



MS109

24x

micromedia
a division of IHS Canada

20 Victoria Street, Toronto, ON M5C 2N8
Tel.: (416) 362-5211
Toll free: 1-800-387-2689
Fax: (416) 362-6161

Collection MICROLOG sur Micromédia
Tableau de résolution

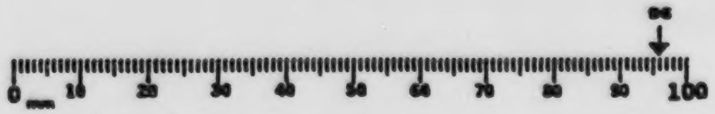
Droits d'auteurs

Les droits d'auteurs du conenu de cette microfiche sont détenus par l'éditeur du document original. Veuillez communiquer avec celui-ci pour obtenir des renseignements sur tout ce qui touche les droits d'auteurs. Les droits d'auteurs de cette édition sur microfiche sont détenus par Micromédia Limitée.

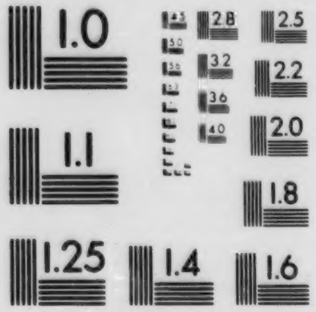
Qualité de reproduction sur microfiche

Micromédia Limitée maintient les normes de reproduction micrographique les plus élevées. Elle fait tout son possible pour obtenir la version sur papier à reproduire sur microfiche de la meilleure qualité possible. Cependant, certains styles d'imprimerie, de couleurs et de style de mise en page graphique (incluant des cartes, des grahiques et des tableaux) se reproduisent mal. En raison de la valeur du document original, Micromédia l'a reproduit tout en reconnaissant qu'il ne sera peut-être pas aussi lisable que le document original.

Tableau de résolution micrographique
National Bureau of Standards
Standard Reference Material 1010a
(ANSI and ISO Test Chart No. 2)



PM-1 3½"x4" PHOTOGRAPHIC MICROCOPY TARGET
NBS 1010a ANSI/ISO #2 EQUIVALENT



MS109

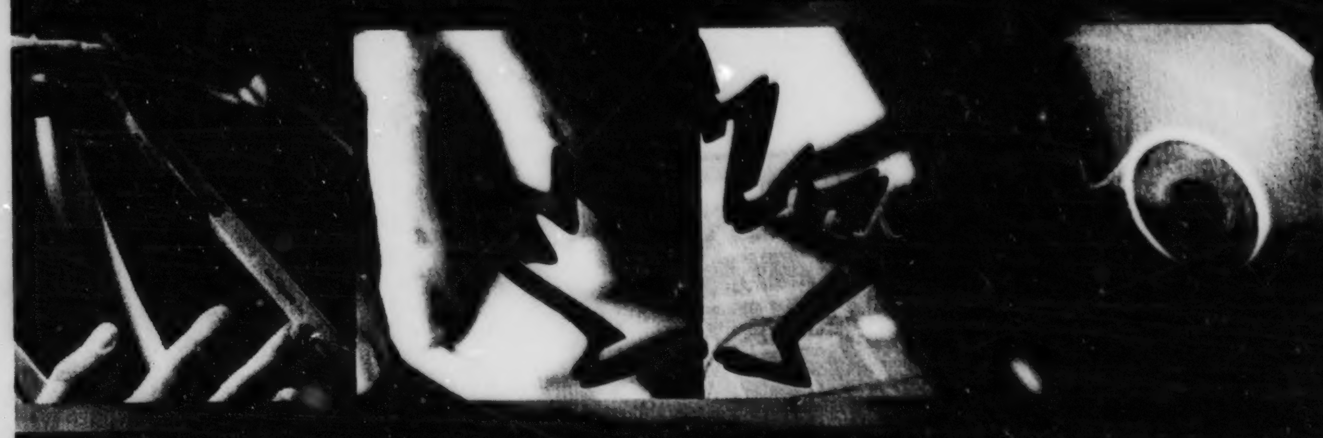
24x

micromedia
a division of IHS Canada

20 Victoria Street, Toronto, ON M5C 2N8
Tel.: (416) 362-5211
Toll free: 1-800-387-2689
Fax: (416) 362-6161

Government of
Canada
Access to Information
Review Task Force

Gouvernement du
Canada
Groupe d'étude de
l'accès à l'information



Access to Information: Making it Work for Canadians

Report of the Access to Information Review Task Force

Canada

Access to Information: Making it Work for Canadians

Report of the Access to Information Review Task Force

June 2002

102-07532/

© Her Majesty the Queen in Right of Canada (Access to Information Review Task Force) 2002. All rights reserved.

Permission is granted to electronically copy and to print in hard copy for internal use only. We ask only that: users exercise due diligence in ensuring the accuracy of the materials reproduced; the Access to Information Review Task Force and the Treasury Board Secretariat are identified as the source department; the reproduction is not represented as an official version of the materials reproduced, nor as having been made in affiliation with or without the endorsement of the Task Force.

All requests for permission to reproduce this work, in whole or in part, for purposes of commercial use, resale or redistribution, shall be addressed to Public Works and Government Services, Ottawa, ON K1A 0S5.

Catalogue Number: BT22-83/2002-MRC

ISBN 0-662-66665-8

June 2002

Mr. Jim Judd
Secretary of the Treasury Board
and Comptroller General for Canada

Mr. Morris Rosenberg
Deputy Minister of Justice
and Deputy Attorney General of Canada

Dear Mr. Judd and Mr. Rosenberg:

I am pleased to submit the report of the Access to Information Review Task Force.

Our mandate was to review all aspects of the access to information regime at the federal level in Canada and make recommendations for improvements.

The recommendations in this report build on the most successful elements of our current regime, address areas in need of reform and propose several new approaches. Collectively, they represent what we believe to be a sensible, pragmatic, integrated and principled approach to the provision of government information to Canadians.

I would like to thank all the participants in our consultations, the authors of submissions to the Task Force, experts who provided us with research and advice, and members of the External Advisory Committee and the Assistant Deputy Minister Advisory Committee for their advice, views and wisdom. We have learned much from them.

I look forward to discussing with you our findings and recommendations.

Yours sincerely,

A. Dela

Andrée Delagrave
Chair
Access to Information Review Task Force

Table of Contents

Introduction

Our View 1
Our Main Points 3
Data at a Glance 8
Our Work 11
The Access to Information Regime – A Primer 13

Chapter 1 – Starting With The Basics: Access Principles and the Right Of Access

Access Principles and the Purpose Clause 17
Right of Access 18
Conclusion 20

Chapter 2 – Revisiting Coverage: Government Institutions

The Executive 22
The Legislature
– Parliament 26
– Officers of Parliament 27
The Courts and the Judiciary 29
Conclusion 30

Chapter 3 – Looking At Scope: Records Covered By The Act

Definition of a Record 31
Under the Control of a Government Institution 31
Contractors' Records Related to the Delivery of Government Programs and Services 33
Records in Ministers' Offices 34
Public Servants' Notes 35
Deliberations of Administrative Tribunals 36
Records Within the Military Justice System 37
Seized Records and Records Obtained in the Context of Litigation 37
Conclusion 38

Chapter 4 – Striking the Right Balance: Exemptions and Exclusions

Exemption/Exclusion Structure....39

- Mandatory vs Discretionary Exemptions 42
- Injury Tests 42
- General Public Interest Override....42
- Positive Duty to Disclose 43
- Interpretation and Application of Exemptions – the Exercise of Discretion 43

Specific Exemptions/Exclusions....44

- Deliberative Processes of Government 44
  - Section 69 – Cabinet Confidences 44
  - Section 21 – Operations of Government....47
- National Security, Defence and Law Enforcement 50
  - Section 13 – Information Obtained in Confidence from Other Governments 51
  - Section 15 – International Affairs and Defence 52
  - Section 16 – Law Enforcement and Investigations....53
  - Section 20 – Information provided by Third Parties about Critical Infrastructure Vulnerabilities 55

Other Exemptions/Exclusions....55

- Section 14 – Federal-Provincial Affairs 55
- Section 17 – Safety of Individuals 56
- Section 18 – Economic Interests of Canada....57
- Section 19 – Personal Information 58
- Section 20 – Third Party Information....59
- Section 22 – Testing Procedures, Tests and Audits....62
- Section 23 – Solicitor-Client Privilege 63
- Section 24 – Statutory Prohibitions 64
- Section 26 – Refusal of Access Where Information is About to be Published 66
- Section 68 – Exclusion of Published Materials 68
- Protecting Cultural and Natural Heritage Sites....68

Conclusion....69

Chapter 5 – The Access Process In The Act

Requests....71
– Format of release....71
– Clarifying and Determining the Scope of Requests....71
– Defining a Request....72
– Frivolous, Vexatious or Abusive Requests....73
Time Limits....73
– Thirty-Day Time Limit....74
– Extensions....75
– Release of Processed Records....75
– When Time Limits Are Not Met....76
Fees....77
– Application Fee....79
– A Differential Fee Structure – Commercial and General Requests....79
– Encouraging Focused Requests....80
– A Fee Structure for Commercial Requests....81
– Fee Rates....81
– Extremely Large Requests....82
– Fee Waiver Criteria....83
– Expedited Delivery....84
– A Summary of the Proposed Fee Structure....84
– Review of Fees....85
– Reinvesting Fees....85
Multiple Requests....85
Duty to Assist the Requester....86
Conclusion....86

Chapter 6 – Ensuring Compliance: The Redress Process

Right to Complain....90
– Administrative Review....90
– Right to Complain about Fees....91
– Time to Complain....91
– Fees to Complain....92
Mandate of the Information Commissioner....92
– Education Mandate....93
– Advisory Mandate....94

– Practice Assessment Mandate 94
– Mediation Mandate 96
Investigating Complaints 97
– The Investigation Process 98
– A Shared Understanding 98
– Clarity as to Issues Under Investigation 100
– Documenting the Handling of the Request 101
– Investigations into Process Matters 101
– Reviews Conducted in Writing 102
– Timely Investigations 103
– Role of Complainant 103
Formal Investigations – Ensuring Procedural Fairness 104
– Confidentiality of the Investigations 104
– Right to Counsel 105
– Subpoenas 106
– Notice to Affected Individuals 108
– Solicitor-Client Privilege 109
– Contempt Powers 110
– Compellability of the Information Commissioner 110
Review by the Federal Court – Litigating Access to Information 111
Structural Models for the Review Process 111
– Ombudsman Model 111
– A Hybrid Model: Order-Making Powers in Relation to Process Issues 112
– Full Order-Making Powers 113
Conclusion 114

Chapter 7 – The Way To A Better Access Process

Facilitating Access for Canadians 117
– Helping Canadians to Access Information 117
– Facilitating the Openness of the Access Process 118
– Facilitating Electronic Request Processing 119
Resourcing the Access Program 120
– Central Resourcing 120
– Resourcing of Individual Institutions 121
Effective Processing of Requests 122
– Access Officials 123
– Making Decisions in Response to Requests 124

Supporting Access Officials 125
– Roles and Responsibilities 125
– Access to Expertise and Advice 127
– Training for Access to Information Officials 128
– Careers in Access 129
– Tools 130
Conclusion 131

Chapter 8 – Meeting the Information Needs of Canadians Outside the Access to Information Act

Proactive Dissemination 134
Passive Dissemination – Libraries and Virtual Reading Rooms 135
Informal Release 136
Special Disclosure Mechanisms for Research Purposes 137
Systematic 30-Year Bulk Review 138
Conclusion 140

Chapter 9 – Addressing the Information Management Deficit

How did we get here? 141
An Information Management Strategy 142
Security Classification and Information Management 144
Accountability for Information Management 145
Support for Public Servants 146
Conclusion 149

Chapter 10 – Measuring and Reporting on Performance

Annual Reports to Parliament 151
Management Information 152
An Analysis of Current Performance Information 152
Accommodating a Variety of Performance Reporting Needs 153
Improved Assessment of Access Activities 153
Conclusion 155

Chapter 11 – Creating a Culture of Access to Government Information

A Cultural Change 157
How is a Culture of Access Created? 158
The Tools to do the Job 158
Fundamental Values of the Public Service 159

Awareness and Training for Public Servants 160
Embedding Access in the Worklife – Incentives and Accountability 161
Serving Ministers 162
Management Support 163
Providing Corporate Leadership 163
Signalling Change – Awareness and Fostering Key Attitudes 163
Conclusion 164

Chapter 12 – Last Word: Enhanced Dialogue on Access to Information 167

List of Recommendations 169

Annexes

– Annex 1 – Data 193
– Annex 2 – Fees Charged by Provincial and International Jurisdictions 197
– Annex 3 – Glossary 205
– Annex 4 – List of Research Papers 209
– Annex 5 – Select Bibliography 211
– Annex 6 – Task Force Mandate and Membership 217
– Annex 7 – Advisory Committees Membership 219
– Annex 8 – Historical Background of Access to Information in Canada 221

Introduction

Our View

When it was introduced in Parliament in 1980, the lofty goals of the *Access to Information Act* were stated as: a more informed dialogue between political leaders and citizens, improved decision making, and greater accountability by the federal government and its institutions.

In introducing the legislation, the Honourable Francis Fox, Secretary of State, told the House of Commons that the Act and the supporting administrative regime "will constitute a significant development for our political institutions."

Twenty years have now passed since the Act was enacted, and more than 15 years since its last comprehensive review by Parliament. It is a fitting time, therefore, to take stock of what has been achieved in giving Canadians access to federal government records, to identify where we've come up short and why, and to decide how we can do better.

Our mandate as a Task Force was to review all aspects of the federal government's access to information (ATI) regime, and to make recommendations on how it might be improved. This required us to examine the broader social and governance context, both in Canada and abroad; to understand how the Act and its administration are perceived by those seeking information and by those responsible for implementing it; to assess the appropriateness and adequacy of the legislation, regulations and policies surrounding it; and to examine the way the Act is being interpreted and applied within the federal government.

Much has changed in the federal government, in Canada, and indeed in the world, since the Act became part of Canadian law.

A virtual revolution in information technology has changed the way government information is created, stored, communicated and managed.

The Canadian government has restructured to reduce costs and improve efficiency. A number of new public, semi-public and private not-for-profit organizations have been created for the provision of services that were previously delivered directly by departments and agencies.

Globalization has increased interdependence among the world's nations so that information on any particular subject is now likely to be found in more than one country.

And the tragic events of September 11, 2001 have made us more aware of our vulnerability and of the need for a careful balancing of public interests when deciding on the release of government information. At the same time, the tragedy has also made us more aware than ever that democracy and openness are fundamental values of the society we all want to live in.

Despite these massive local, national and global changes, the Task Force has concluded that the *Access to Information Act* is still basically sound in concept, structure and balance.

After 18 months of research, consultations and reflections, we are convinced that the original goals and principles of the Act remain as relevant and attainable today, as when they were embraced 20 years ago.

However, we believe some of the Act's provisions are in need of modernization and amendment – and we make specific recommendations for these needed legislative changes.

Equally importantly, we believe that some broader administrative practices and attitudes within government must be changed – from the way records are created and managed, to how public servants are trained and educated, to the way government information is made available to Canadians outside the Act.

These legislative and administrative measures, by themselves, will not be enough to ensure the objectives of the Act are achieved. They must be supported by a strong "access" culture within government.

To create and maintain this culture, the principles of access to information must be embedded in the organizational culture of the public service – providing information to Canadians must be recognized as a legitimate, and indeed, core aspect of every public servant's day-to-day work. Access to information must be valued and recognized and become a matter of pride for the public service.

Fundamentally, we believe a recommitment to the original goals and principles of the Act is required by everyone involved in access to information: public servants who create and manage information; officials who administer the Act; Ministers who are accountable for the operations of government and who often feel the impact of the Act directly; and Canadians who make requests for information under it.

True and lasting renewal will require a commitment to all three elements of reform – legislative, administrative and cultural. It will also take time, leadership and resources. And it will require a vision of providing information to Canadians that looks beyond the narrow purview of the *Access to Information Act.*

We hope our report will provide a blueprint for renewal that can realistically be achieved and maintained.

Equally, we hope our extensive research and consultations will help Canadians who apply for information under the *Access to Information Act*, and public servants who administer it, to better understand the current process and what needs to be improved to nurture an informed and involved citizenry in Canada.

Our Main Points

Findings

- Canadians are making a relatively modest,[1] but increasing, and more sophisticated, use of the *Access to Information Act*. In coming years, more and more Canadians will expect to have ready access to government information, and will be increasingly motivated to seek it out in a variety of ways.

- In a knowledge-based society, information is a public resource and essential for collective learning. If Canada is to thrive and compete, government information must be made available as widely and easily as possible, through a variety of channels. Technology provides powerful and cost-effective ways to disseminate a great deal of this information. The formal process under the Act cannot meet all the needs of Canadians for government information, nor was it ever intended to.

- After 20 years, the Act is still not well-understood by the public, requesters, third parties who supply information to government, or even the public service. There is a pressing need for more education about access to information.

- There is agreement that the principles set out in the purpose clause of the Act are the right ones.

- Many requesters feel that the essence of the Act is sound, but it continues to be applied inconsistently and in such a way as to contradict the principles of openness, transparency and accountability that underlie it. Delays, fees and inconsistency are major complaints.

- Public servants express concern about the time and resources required to respond to increasingly large and complex requests, about a lack of clarity in the rules, and about the way in which investigations into complaints are conducted.

- The Information Commissioner is critical of what he perceives to be a deeply entrenched culture of secrecy in government, and a lack of commitment to the principles of the Act.

- Journalistic use of Access to Information has evolved since 1983 when the Act was introduced. The number of requests has grown but so has their focus. Requests are now sharper and to the point. The way in which information is used has also grown in complexity.

- The performance of the federal access to information regime is largely similar to that in other jurisdictions in Canada and abroad. The challenges and issues are strikingly the same: timeliness of responses, information management, transparency of new service delivery public bodies, managing growth in demand, resourcing of the access program, effective oversight and resolution of disputes, and creating and maintaining support for access to information both at the political level and in the public service.

- Overall, the Act is basically sound in concept, structure and balance. However, there is a need to modernize some provisions – such as bringing Cabinet confidences under the Act – to clarify some others, and to address gaps.

- The scope of the Act is generally more restrictive than comparable legislation in other countries and Canadian provinces. There are no criteria for consistent and principled decisions on coverage of new institutions.

- Fees were not intended as a cost-recovery mechanism and should never be an obstacle to legitimate requests. They should act as an incentive for focussed requests and as a safeguard for the sustainability of the system. These objectives would be better met with a fee structure that differentiates between commercial requests and general requests, and provides a mechanism to manage the exceptional costs of very large requests.

- The Office of the Information Commissioner is an important Canadian institution that should be supported, and equipped with the powers and resources, to continue to fulfil its challenging role of oversight in the future.

- Resolution of individual complaints through negotiated solutions is highly successful. Good tools to deal with systemic issues, however, are missing.

- The great majority of complaint investigations are conducted informally. However, there has been, in recent years, a noticeable increase in the use of formal investigative powers, raising new procedural issues that need to be addressed.

- At every stage of the access process – from the receipt of requests to complaint investigations – there is an overwhelming need for more rigorous processes, clearer and more widely understood rules, and greater consistency in outcomes, both for requesters and for government institutions.

- There is a need to move from a reactive approach to a program delivery concept of access to information. Adequate resourcing of all the components of the system (ATI units, programs, central agencies providing support, and the Office of the Information Commissioner), is critical. Access to information needs to be resourced in the same way as any program delivered by the Government of Canada.

- Access Coordinators and their staffs are key to an effective access regime. The government is facing a looming crisis in the recruitment and retention of these skilled professionals. Officials administering the Act need more support, training, career development, and better technology and tools.

- Public servants do not have the training, tools and support they need. Access work has to be juggled with other operational priorities. It is often not perceived as "valued" work or part of their "real" job. The principles of access have not yet been successfully integrated into the core values of the public service and embedded in its routines.

- There cannot be better access to information without better information management. There is an urgent need for leadership and government-wide action in this area.

- There is no magic solution to the shortcomings of the system. A healthy access to information system needs all its parts functioning well in order to deliver the outcomes intended by Parliament: the right systems to process requests, skilled staff, supportive managers and Ministers, adequate resources, good information management, good understanding of the principles and the rules by all, including third parties, and effective approaches to oversight.

- The total costs of administering the Act are in the order of $30 million annually[2] or less than $1 per Canadian per year.[3] This is a modest cost, in light of the significant public policy objectives pursued by the Act: accountability and transparency of government, ethical and careful behaviour on the part of public officials, participation of Canadians in public policy design, and a better informed and more competitive society.

Proposed Directions

In our report, we have made 139 recommendations for change. They can best be understood under several broad themes:

- enhancing the understanding of principles of access to information and expanding the right of access in an era of globalization (Chapter 1);
- modernizing the scope of the Act by adopting consistent and principled criteria for determining which institutions should be covered, and applying the criteria to expand coverage to a significantly wider range of federal institutions (Chapter 2);
- clarifying what records should be covered by the Act (Chapter 3);
- modernizing the exemption and exclusion provisions (e.g. by making Cabinet confidences subject to the Act), and ensuring the balance provided in the Act results in maximum responsible disclosure and the appropriate protection of sensitive information where it is in the public interest (Chapter 4);
- making the process of formal access to information requests work better for both requesters and for institutions, to ensure that Canadians get access to disclosable information in a simple, timely and effective way while safeguarding the sustainability of the access system (Chapter 5);
- enhancing the effectiveness, fairness and transparency of the complaints process, explicitly giving the Information Commissioner the tools needed to fulfil his mandate, and suggesting that consideration be given to replacing the current ombudsman model with full order-making powers (Chapter 6);
- ensuring that access to information staff have the necessary skills, training, tools, and resources, and that technology is applied to make access easier for Canadians (Chapter 7);
- putting in place a comprehensive strategy to provide information to Canadians through a variety of channels outside the Act, complemented by access under the Act as a last resort (Chapter 8);

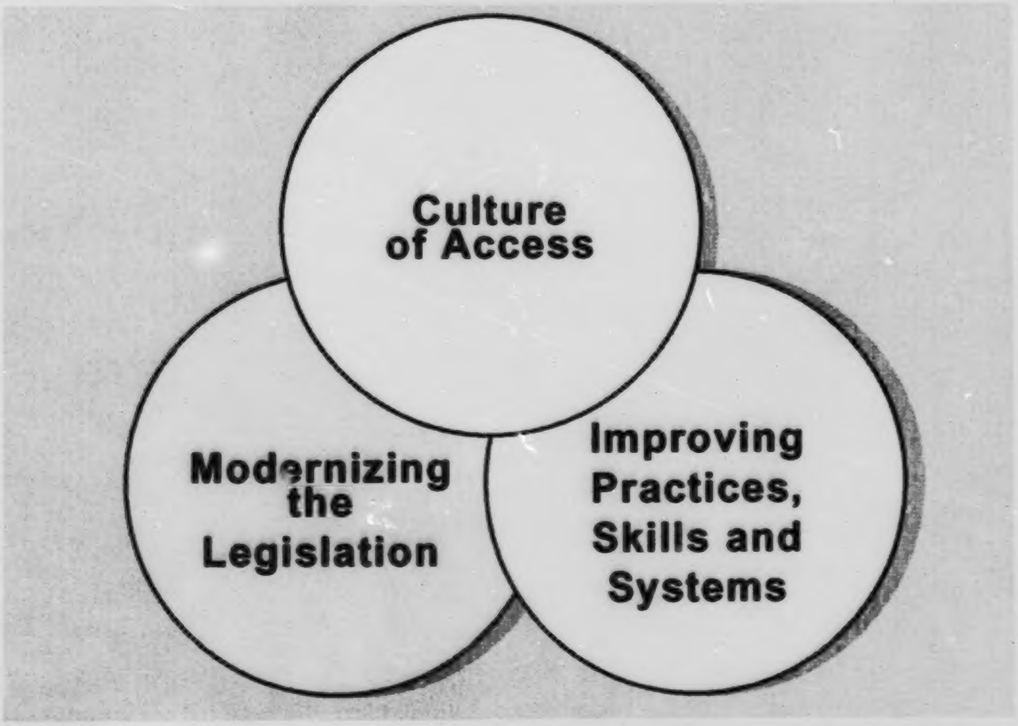
- enhancing information management *in government*, especially through training and support for all public servants (Chapter 9);

- improving the performance measurement and reporting of the access activities of federal institutions in order to support operational improvements and allow for better monitoring by Parliament (Chapter 10);

- creating a culture of access to information in the public service (Chapter 11); and

- promoting sustained dialogue on access to information and enhancing parliamentary oversight (Chapter 12).

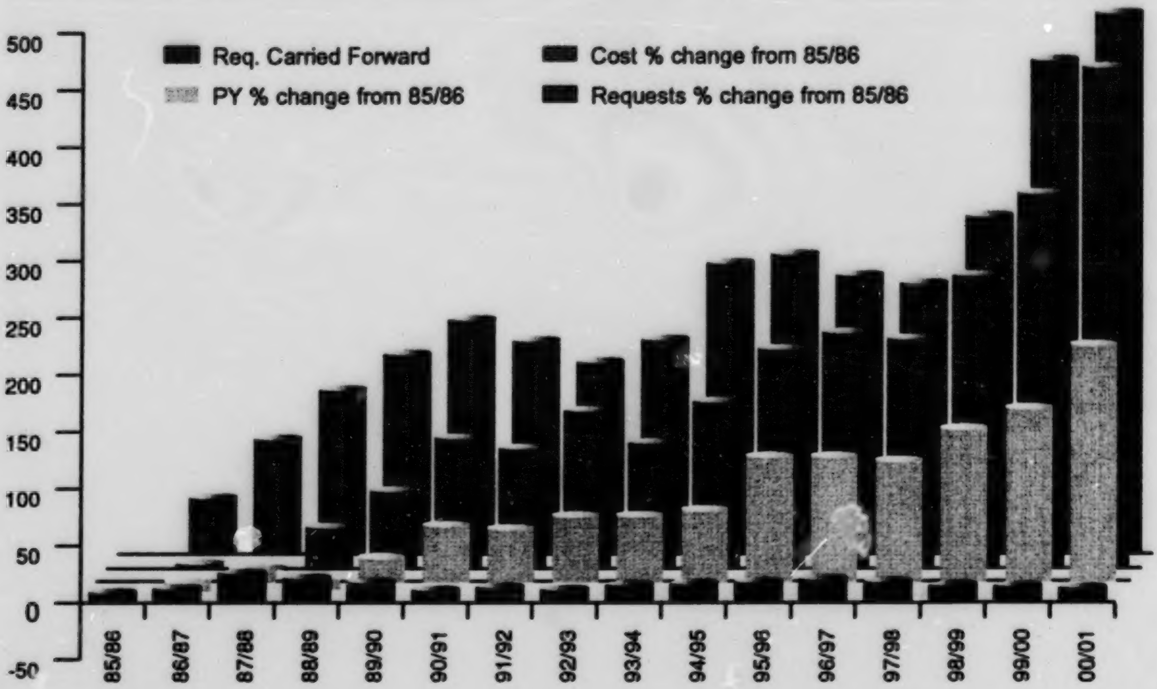
A Comprehensive Approach to the Reform of the Access to Information Regime


Culture of Access
Modernizing the Legislation
Improving Practices, Skills and Systems

Data at a Glance

- In 2000-2001, federal institutions received 20,789 requests. In the last 5 years, from 1995-96 to 2000-01, requests have increased by 64 per cent.

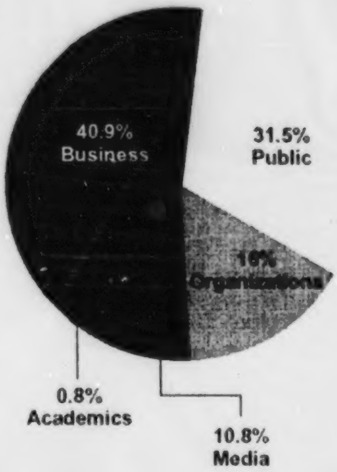
ATI Key element Comparison 1985-2001 (%)



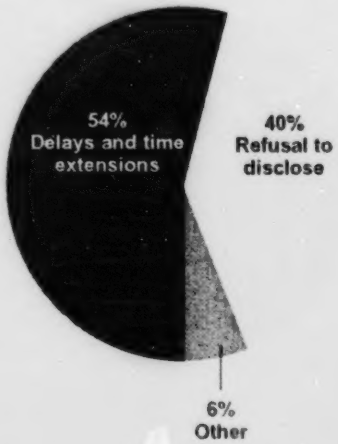
- Until 1998-1999 there was a relatively steady increase in the number of requests received by federal institutions, and a corresponding increase in costs of the system. There was a significant jump in the number of requests in 1999-2000 and 2000-2001 followed by a significant increase in costs. For many years the number of ATI staff [in person-years (PYs)] reported by institutions followed the steady increase in volume, but this has fallen behind the increase in volume of requests over the last two years. Since 1985-1986 there has been very little change in the percentage of requests carried forward annually, indicating that there has not been a serious build-up of backlog.

- Over one-half of all requests (52 per cent in 2000-2001) are made to five government institutions: Citizenship and Immigration Canada; National Archives; Health Canada; Human Resources Development Canada; and the Department of National Defence.
- While the identity of requesters is protected, statistics are kept on the broad affiliations or categories of users. The data indicates that, in 2000-2001, businesses made more use of the Act than any other group (40.9 per cent), followed by the general public (31.5 per cent), organizations (16 per cent), the media (10.8 per cent) and academics (0.8 per cent). While usually included in the general public category, requests from Parliamentarians are estimated to be 10 per cent of all requests.
- A limited number of requesters generate the majority of requests: based on data for 1998-99, 35 per cent of requesters make more than one request per year and 11 per cent make more than seven requests.
- In 2000-2001, full disclosure was granted in 37.5 per cent of the requests, partial disclosure in 35.6 per cent of the requests. Another 1.9 per cent resulted in the informal disclosure of information to the requesters. No information was disclosed as a result of applying exemptions in 3 per cent of the requests, and in 0.3 per cent as a result of applying exclusions. 20.4 per cent of the requests could not be processed because there was insufficient information, records did not exist or the request was abandoned by the applicant.
- The vast majority of requests are small, with 80 per cent resulting in the release of fewer than 100 pages. A few, about 1 per cent, are very large, resulting in the release of more than 1,000 pages.[4]
- The largest request received at this point was to the Department of Foreign Affairs for 1.2 million documents.
- Less than 10 per cent of requests result in complaints to the Information Commissioner. In 2000-2001, 1,337 complaints were investigated by the Investigation Commissioner. Only two were not resolved to his satisfaction and are now before the Federal Court.
- Investigations by the Information Commissioner took, on average, 5.4 months in 2000-2001; the length and the costs of investigations are increasing (both for the Office of the Information Commissioner and government institutions).
- Delays (missing either the original 30-day time limit, or an extension permitted by the Act) represented the single largest source of complaints (43 per cent in 2000-2001), followed by complaints about refusals to disclose information (40 per cent) and about the length of extensions to the time limit for responses (11 per cent).[5]
- In 60 to 80 per cent of the complaints, the Information Commissioner agreed with the application of exemptions by government institutions.

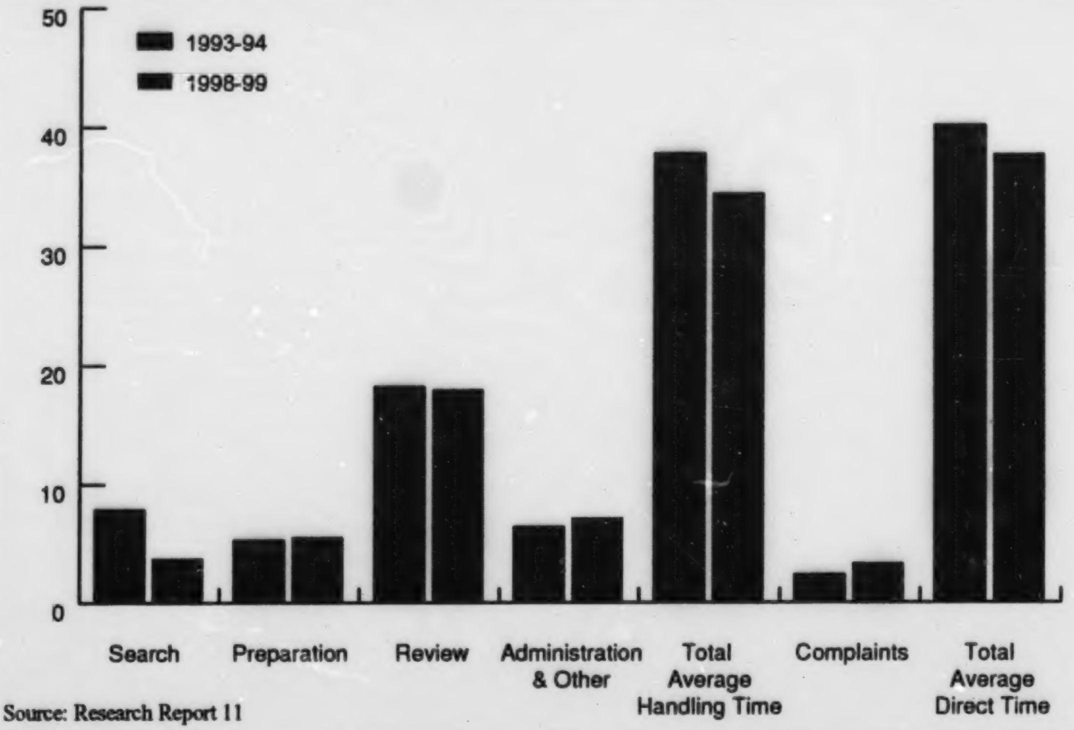
Source of requests (2000–2001)



Reasons for complaints (2000–2001)



Request handling time (in hours)



Source: Research Report 11

- While the overall number of delays and delay complaints has increased, the average number of hours it takes to respond to an individual request (including the time to resolve related complaints) has decreased slightly from 40 hours, in 1993-94, to 38 hours in 1998-99.
- The total costs (direct and indirect) for the access to information program, including the Office of the Information Commissioner's costs, were estimated at $28,845,000 in 1999. Between 1993-94, and 1998-99, they rose at an average rate of 7 per cent per year. The increased costs are due to the growth in demand while the per unit cost has remained stable or even declined slightly, due to greater efficiency in processing.
- Search costs have declined significantly (by about 30 per cent) since 1994 and could come down some more with better records management. However, these savings were offset by a 64 per cent increase in the costs of administrative and other activities – for example, contact with requesters, tracking requests, review – and a 104 per cent increase in the cost of responding to complaints.
- Fees are waived or not collected for about two-thirds of requests. Fees recovered account for approximately 1.8 per cent of the direct costs of administering the access program.[6]

Our Work

The Government of Canada created the Task Force to review all aspects of the federal access to information regime and to make recommendations as to how it might be improved.

The Task Force was composed of public servants with a range of backgrounds and experience from various federal institutions (list of members at Annex 6). It was guided by two advisory committees: one of individuals from outside of government representing a broad range of relevant experience and interests, the External Advisory Committee; and one of senior government officials, the Advisory Committee of Assistant Deputy Ministers (Annex 7).

Our challenge, as we saw it, was to provide well-researched, principled and pragmatic recommendations to the government on how to modernize the access to information regime in ways that promote open, effective and accountable government, an informed citizenry, and the public interest.

To meet this challenge, we reviewed previous comments and proposals for reform, commissioned research and consulted with external stakeholders, as well as with other jurisdictions and within the government:

- We first reviewed previous reports and analyses, including the government's 1977 Green Paper on *Legislation on Public Access to Government Documents* (the Green Paper); the 1987 report of the House of Commons Standing Committee on Justice and Solicitor General reviewing the Act (the Parliamentary Committee) and the Government's response; annual reports published by successive Information Commissioners (particularly the suggestions for reform made by the Information Commissioner in his 2000-2001 report); analyses of access issues in other provinces and countries; the comments and reports of Members of Parliament and Private Members' bills; and academic commentaries on access issues in general and on the Canadian regime in particular.
- To obtain the views of Canadians who use the Act, third parties who provide information to the government, and the public generally, we posted on our Web site a consultation paper setting out the key issues as we saw them from our analysis of previous proposals and a literature review. In response, we received submissions which included recommendations on virtually all aspects of the Act and its administration. In addition, five formal roundtable consultations were held with key stakeholders, including journalists, librarians, archivists, historians, academics, businesses and business associations, public interest groups and unions.[7] We also held a number of informal meetings with various stakeholders and associations. Taken together, these consultations gave us a much better understanding of the frustrations, concerns and expectations of users and other stakeholders.
- We held a range of consultations within the public service. We wanted to understand the particular challenges of specific communities, for example those dealing with international or scientific information. Through discussion groups with rank and file public servants and with managers, we tried to understand the perceptions of the people who create, manage and release the information. In addition, we consulted

with the access officials who manage the access to information process within federal institutions to benefit from their experience, their unique knowledge of the system, and their thoughtful views about improving it.

- In addition to benefiting from the detailed analyses and recommendations in reports published by the Information Commissioner and his predecessors, we discussed options for reform with representatives of his office.
- We compared the provisions of the Canadian law with similar legislation in other jurisdictions, paying particular attention to recent legislation or amendments. We also met with government officials, those providing the oversight function, academics and various stakeholders in six Canadian provinces, and in Australia, Ireland, France, Sweden, the United Kingdom and the United States. We benefited greatly from their insights and advice. These consultations helped to shape our perspective on the Canadian regime and provided us with a wealth of ideas and best practices to emulate. We compared our system with other jurisdictions to draw on their most effective provisions and practices, but also to question ours wherever they were significantly different. It was, however, always clear to us that our Act had to be tailored to the specific needs of Canadian society, and to work within the context of our institutions, our political culture, and the structure of our public service.
- To deepen our understanding of the issues and identify potential solutions, we commissioned 29 research reports on a range of access-related issues.

To make our work and our process transparent and accessible, we established a Web site and posted on it the results of our research and consultations, the submissions we received and summaries of the advice provided by our advisory committees. We believe this information provides the most comprehensive picture ever assembled of access to information at the federal level in Canada. This background information is contained on the CD-ROM accompanying our report.

Finally, after observing that there is a general lack of knowledge and understanding of the Act and its administration, both inside and outside the public service, we decided that our report would not only make recommendations for reform but also inform our readers about access to information. For example, we have highlighted a number of best practices that we believe should be implemented across government. (They are identified by a check mark ✔ in our text.) We hope our report provides a comprehensive body of work that can be used by decision-makers and others now, and in the future.

The Access to Information Regime – A Primer

Background

Canada is now one of 46 countries to have access to information (or freedom of information) legislation. Some of these countries have long-established access to information traditions and legislation: Sweden with a first law dating from 1766, Finland with the first modern access to information legislation in 1951 and the United States with the 1966 *Freedom of Information Act.* The trend in adopting access to information laws has clearly gathered speed in recent years.

In Canada, access to information legislation was not pioneered at the federal level. Nova Scotia was the first government to pass freedom of information legislation in 1977, followed by New Brunswick in 1978, Newfoundland in 1981 and Quebec in 1982. The Canadian *Access to Information Act* was passed in conjunction with the *Privacy Act* in June 1982 and came into force July 1, 1983. All of the remaining provincial and territorial jurisdictions have since followed with their own access legislation (See also Annex 8).

In 1986, three years after the Act came into force, an in-depth review was conducted by the House of Commons Standing Committee on Justice and Solicitor General (frequently referred to in our report as "the 1986 Parliamentary Committee"). Its report, *"Open and Shut: Enhancing the right to know and the right to privacy"*, was issued in March, 1987 and the government's response: *"Access and Privacy: the Steps Ahead"* was issued later the same year. While the government implemented most of the administrative changes recommended by the Committee, it did not make the recommended legislative changes.

Since it was first enacted, the *Access to Information Act* has been amended three times. In 1992, the Act was amended to deal with the provision of records in alternate formats to individuals with sensory disabilities. In 1999, it was amended to make it a criminal offence to intentionally obstruct the right of access by destroying, altering, hiding or falsifying a record, or directing anyone else to do so. In 2001, it was amended by the *Anti-terrorism Act* which provides that a certificate by the Attorney General prohibiting the disclosure of information for the purpose of protecting national defence or national security will override the provisions of the *Access to Information Act.*

The Access to Information Regime

The *Access to Information Act* is said to be quasi-constitutional in that it overrides provisions in other federal laws, except those listed in Schedule II of the Act. The Act provides a right of access to general government information, while personal information held by the government is governed by the provisions of the *Privacy Act.*

The Act identifies the institutions it applies to, the types of government information that may or must be protected in response to requests, and the types of information that are excluded entirely from the scope of the Act. The Act also delineates the process for making a request including the timelines and the procedures for notifying third parties; it establishes the Office of the Information Commissioner to receive and investigate complaints; and provides a further right of review by the Federal Court.

The *Access to Information Regulations* contain more detailed rules relating to the making of a request under the Act, the transfer of requests from one government institution to another, and fees.

The *Access to Information Policy*[8] sets out requirements for all government institutions to follow in order to ensure the effective and consistent application of the Act. The *Access to Information Guidelines*[9] provide detailed guidance and best practices, primarily for the use of government officials in the day-to-day administration of the Act.

Two ministers share responsibilities for access to information. The Minister of Justice is responsible for the legislation. The President of the Treasury Board has been designated as the Minister responsible for overseeing the administration of the Act, for the issuance of guidelines and directives to government institutions, and for producing a publication (*Info Source*) containing information about government institutions and their information holdings to assist individuals in exercising their rights under the legislation. *Info Source* is available on the Government of Canada Web site.[10]

How it works

Every institution covered by the *Access to Information Act* is listed in Schedule I. The "head" of the institution (either the Minister or a person designated by Order in Council) is responsible for the administration of the Act in the institution, as is an official who is delegated some or all of these responsibilities (usually referred to as the Access Coordinator).

Requests made under the Act must be made in writing to the Access Coordinator, whose address is listed in *Info Source*. The Access Coordinator or a member of the Coordinator's staff contacts the requester, as well as officials in the institution who are likely to have the relevant information and any others who must be contacted (such as third parties). There is usually further contact with the requester about the timing of the release of information and the fees the institution proposes to charge.

There is a two-tiered review process. Requesters have the right to complain to the Information Commissioner about an institution's handling of their request. Following an investigation and report by the Commissioner to the head of the institution, there is a further right to seek a review of a denial of access in the Federal Court of Canada.

The Treasury Board Secretariat, through its Information and Security Policy Division, is the primary source of expert advice, training and guidance to federal institutions. Institutions receive legal advice on access to information issues from the Department of Justice through in-house legal services units or from its Information Law and Privacy Unit.

Government institutions subject to the Act are required to report to Parliament annually on their administration of the Act. Each year, the President of the Treasury Board tables an aggregate of the statistical data in these reports. Parliament also receives the annual reports of the Information Commissioner, in addition to any special reports the Commissioner may decide to submit.

---

[1] Based on the U.S. experience, the Canadian government was expecting 50,000 requests for 1984, the first year of the implementation of the Act. In fact, 2,229 requests were received. The 20,000 requests mark was exceeded for the first time in 2000-01. In 2000-01, the ratio of access to information and privacy requests at the federal level to the total Canadian population was about 0.004 or half the ratio in the U.S. (0.0079).

[2] *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation*, Research Report 11. The study conducted by Consulting and Audit Canada concluded, based on 1998-99 data, that total costs (direct and indirect) for access to information programs were $28.8 million. This amount is generally criticized by government institutions as too low and by stakeholders as inflated. However, it was largely validated by subsequent work of Consulting and Audit Canada in specific institutions.

[3] The ratio is similar in the U.S. With a population of 281 million, the costs of all Freedom of Information activities for U.S. federal agencies were $253 million for year 2000.

[4] Goss Gilroy Inc., *An Analysis of Fees for Access to Information Requests*, Research Report 23.

[5] As this report was going to print, the Annual Report of the Information Commissioner for 2001-2002, was released on June 6, 2002. It indicates a decrease in the number of complaints, in spite of an increase in the overall number of requests to government institutions. In 2001-2002, 1,232 investigations were completed, of which 28.2 per cent were about delay; 6.2% about time extension; and 5.5% about fees.

[6] Supra, note 2, by comparison, fees recovered by U.S. federal agencies, in 2000, accounted for 2.8 per cent of total agency costs.

[7] Public Policy Forum, *Report on Consultations to Review the Access to Information Act and its Implementation*, August 2001.

[8] *Access to Information, Information and Administrative Management, Treasury Board Manual*, Public Works and Government Services Canada, 1993.

[9] Ibid.

[10] *Info Source* www.infosource.gc.ca

Chapter 1 – Starting with the Basics: Access Principles and the Right of Access

The first step in reviewing the *Access to Information Act* and its application is to examine the underlying principles and goals to determine whether they continue to reflect the interests of Canadians and Canadian society. Access principles should instil a notion of public trust, and respect the public interest, by encouraging the greatest degree of openness and transparency while taking into account legitimate concerns such as personal privacy, commercial confidentiality, and intergovernmental affairs.

The rationale for access to information legislation was recognized in the Government's 1977 Green Paper[1] on public access to government documents which concluded that:

- effective accountability – the public's judgment of choices taken by government – depends on knowing the information and options available to the decision-makers;
- government documents often contain information vital to the effective participation of citizens and organizations in government decision-making; and
- government has become the single most important storehouse of information about our society, information that is developed at public expense so should be publicly available wherever possible.

Open government is the basis of democracy.

Green Paper, 1977

The proposition that democracies are better served when citizens are informed, and when they are interested and engaged in public life, is well established. [ ] Information is sometimes regarded as the currency of democratic life.

Neil Nevitte
Research Report 2

Access Principles and the Purpose Clause

Parliament chose to enshrine the principle of the right of access to information in the Act. The purpose clause in Section 2 provides guidance to the courts in interpreting the Act and to public servants in applying it.

Section 2 sets out a right of access to government-held information in accordance with the following principles:

- government information should be available to the public;
- necessary exceptions to the right of access should be limited and specific; and
- decisions on the disclosure of government information should be reviewed independently of government.

The section also provides that the Act is intended to complement existing procedures for access, and not to limit access to information that is normally available to the public.

Object clauses can be important interpretational tools, providing guidance on the proper interpretation of other provisions of the Act where there is vagueness or ambiguity.

Australian Law Reform
Commission Report 77

The courts have consistently referred to the purpose clause in interpreting the Act.

The 1986 Parliamentary Committee did not recommend any change to the access principles described in Section 2. However, the Committee did recommend that the Act mandate the Treasury Board Secretariat and the Information Commissioner to educate both the general public and public servants about access principles.

Throughout our consultations, we found that most stakeholders, members of the general public and public servants were not aware of the principles set out in the Act. However, once they were made aware of them, they concluded that these principles are the right ones and as relevant for the future as they were 20 years ago.

It is our view that this lack of knowledge or understanding of access principles can adversely affect how the Act is interpreted and applied. We therefore agree with the Parliamentary Committee that the existence of the purpose clause and the principles it represents should be better communicated both to the general public and public servants.

[Stakeholders] support the principles that underlie the Act and feel that the intent of providing public access to government-held information, as outlined in the Act's purpose clause, reflects the importance of information-sharing between a government and its citizens in a democratic system.

Report on Consultations to Review the Access to Information Act and its Implementation

1.1 The Task Force recommends that

- **the access principles currently set out in the purpose clause in Section 2 of the Act remain unchanged; and**
- **Treasury Board Secretariat and the Information Commissioner ensure that access principles are better communicated to the general public and to public servants.**

Right of Access

Related to the principles of accountability and public participation underlying the Act is who can apply for access to information held by the Government of Canada. It it is our view that the scope of the right of access should be re-examined in light of our increasingly globalized world.

Section 4 of the Act gives Canadian citizens and permanent residents a right of access to records under the control of a government institution. It also empowers the Governor in Council to extend this right to others. In 1989, the government did extend access rights to all individuals and incorporated entities present in the country. The right of access of the requester is verified in each case before a request is processed (e.g. by return mailing address).

Should there be *any* geographic restriction on the right of access?

It can be argued that extending rights to non-Canadians outside the country is unlikely to contribute to the underlying objectives of access to information, namely, promoting the accountability of the

This requirement seems redundant and out-of-step with the pattern in other FOI laws, which normally make no distinction as to the nationality of the applicant. For those foreign applicants who want to use the Canadian Act, there is no problem in finding a Canadian surrogate to make the request for them.

Colin J. Bennett
Research Report 3

Government of Canada and increasing Canadians' participation in the development of government policy. Extending the right of access to information might also impose additional costs on Canadian taxpayers.

On the other hand:

- with increasing globalization, more and more records about an issue will be located in more than one country and researchers will have to get them from all jurisdictions to compile a complete picture;
- individuals and organizations outside Canada can have a legitimate interest in Canadian government records, just as Canadians can have a legitimate interest in information held by other governments;
- freedom of information legislation in most other jurisdictions, including the United States, provides a universal right of access and Canadians can, and do, apply to these jurisdictions for information;
- individuals and organizations outside Canada currently circumvent the restriction by getting a person in Canada to make an access to information request on their behalf; and
- the existing restriction impedes the government from moving to a system of electronic access to information, where requests could be made and responded to electronically, as it would be very difficult to determine the requester's location.

As long ago as 1986, the Parliamentary Committee recommended that any natural or legal person become eligible to apply for access to records under the Act. Given our increasingly interconnected world and the less restrictive approaches in other jurisdictions, the Task Force is of the view that the requirement that the requester be present in Canada is probably not sustainable, at least over the longer term.

Jurisdictions with no restriction, such as the United States, have reported that foreign requests have not had a significant impact on either the volume or size of requests. They believe the only difference is that requests from abroad can be made directly, instead of through a domestic agent. There is no reason to believe the impact of lifting restrictions would be any different in Canada. However, departments with an internationally-focused mandate may be apprehensive about the impact of such a change on their operations. Further work could be undertaken with those departments to assess any probable impact, and how it could be managed.

1.2 The Task Force recommends that, following further discussions with those departments most likely to be affected about the impact on costs and how to manage any increase in requests that may result, the Act be amended to provide that *any person* has a right of access to records under the control of a government institution.

As part of my research on the U.S. and the Rwandan genocide of 1994, I used the U.S. *Freedom of Information Act* to obtain the release of material that tells the story of our inaction. In order to understand specific U.S. activities at the United Nations, I also filed requests under Canada's *Access to Information Act* to learn how the Canadian government perceived U.S. actions. Consequently, a more accurate picture of the U.S. role emerges, and a better understanding of this horrendous episode becomes possible. In this way, the use of access laws abroad contributes to accountability at home.

William Ferroggiaro
National Security Archive
Washington D.C.

Conclusion

The purpose clause in Section 2 remains valid but needs to be better communicated, both to the general public and public servants.

Further discussions should be held with departments most likely to be affected by expanding the right of access to "any person". However, we agree with a number of stakeholders that it is time the Act was modernized to provide a universal right of access.

---

[1] The Honourable John Roberts, Secretary of State, *Legislation on Public Access to Government Documents,* (Green Paper) (Minister of Supply and Services Canada, 1977).

Chapter 2 – Revisiting Coverage: Government Institutions

Fundamental to any access to information regime is what institutions are covered by the legislation, and how they become covered.

There should be very few agencies, regardless of their status, federal department, special operating agency, crown corporation, etc., that are exempted under the Act. Any of those applying to be exempted should provide overwhelming proof for this special status.

Canadian Library Association
Submission to the Task Force

When the *Access to Information Act* first came into force in 1983, departments and a few Crown corporations carried out most of the work of government. Since then, the Government of Canada has made changes to the public sector in order to reduce costs and improve efficiency. These changes have included the transfer of functions out of government, the creation of alternative service delivery organizations (some with a partial "for profit" mandate), and partnerships with other levels of government and the private sector. In the future, we will obviously see public functions delivered by more and more varied institutions, many of which will be at arm's length from the government.

The challenge is to find effective, practical ways to ensure that Canadians' basic right to be informed is always considered when decisions are taken to establish these institutions. We have concluded that there is no simple approach to determining which institutions should be covered under the Act. We do not advocate simply extending coverage automatically to each new alternative service delivery organization (i.e. Crown corporations, private, not-for-profit corporations, federal-provincial-territorial partnerships, etc.). Moreover, the Act should not be extended to every private sector entity carrying out an activity that may be viewed as having a potential impact on the public interest.

[T]he effectiveness of many FOI laws has been undermined as a consequence of restructuring. These laws have traditionally applied to government departments or other agencies that are tightly linked to these departments. As authority has shifted to quasi-governmental or private organizations, the ambit of the law has shrunk.

Alasdair Roberts
Structural Pluralism and the Right to Information
School of Policy Studies, Working Paper 15, February 2001

The Act applies to records under the control of government institutions, but does not include a substantive definition of "government institution." Nor does it set out criteria for identifying such institutions. Section 3 of the Act simply defines a government institution as any department or ministry, body or office listed in Schedule I of the Act. Schedule I lists 19 departments and ministries, and 143 other bodies and offices. These range from the Atlantic Canada Opportunities Agency to the Bank of Canada, the National Parole Board and the Royal Canadian Mint.

Section 77(2) of the Act permits the government to add new institutions to Schedule I by Order in Council. However, deletion requires an Act of Parliament.

Coverage of institutions under the Act has been criticized for several reasons:

- many institutions currently delivering government services are not subject to the Act;
- there is apparently no logical, consistent rationale as to why some institutions are listed on Schedule I, and others are not;
- there is apparently no formal process within government for ensuring that the Act's application is considered when new institutions are created; and
- Schedule I is limited to institutions that form part of the executive branch of government, and does not cover Parliament or the courts.

Based on studies completed for the Task Force, extensive comparisons with other jurisdictions, and strong messages in public consultations, we have concluded that the scope of the Act needs to be expanded and made more consistent and principled. We will consider coverage of all three branches of government: executive, legislative and judicial.

There is room to widen the scope of the *Access to Information Act* with respect to entities of the executive branch – which should remain the major focus of freedom of information measures, since they exercise the decision-making power of government.

Jerry Bartram
Research Report 12

The Executive

Government programs and services are delivered by departments, agencies, boards, tribunals, Crown corporations and other organizations which together constitute the executive branch of government. Although alternative service delivery organizations in the private sector are not part of the executive branch, we have included them here because many of them carry out public functions.

The government continues to create organizations intended to achieve a public purpose at some distance from government. The Act may or may not apply to such organizations. At the present time, for example, 25 Crown corporations are subject to the Act and 17 are not. Several other alternative service delivery organizations are not covered by the Act. These include subsidiaries of Crown corporations and private, not-for-profit corporations such as Nav Canada and The Canadian Wheat Board. We could not identify an obvious rationale or any apparent criteria that were used in determining which of these organizations should be subject to the Act.

It is our view that the current approach is unsatisfactory. In designing a solution, we believe that a number of observations are pertinent.

- The scope of the Canadian legislation is more restrictive than in most other jurisdictions.
- There are apparent anomalies in the application of the Act (e.g. the Royal Canadian Mint is subject to the Act, while Canada Post is not, even though both Crown corporations are actively involved in selling products and services in Canada and abroad).

- There is widespread concern on the part of many Crown corporations not now covered, about how to protect their commercial interests if the Act is extended to them, and how to ensure a level playing field with their non-government competitors since they are expected to make a profit.
- Some organizations have unique concerns relating to their mandates (e.g. the Canadian Broadcasting Corporation is justifiably concerned about its ability to protect its program material and journalistic sources).
- Crown corporations' subsidiaries are enormously diverse and include: companies set up for a particular purpose but which are now dormant; numbered companies that simply hold the shares of other corporate interests; and thriving commercial interests marketing our technological and other expertise abroad.
- Even though government has transferred certain operations to private, not-for-profit corporations, it continues to be the regulator (e.g. air navigation services were transferred to Nav Canada, but safety information is still available from Transport Canada which regulates air safety and is subject to the Act).
- Some organizations singled out by commentators for possible coverage are carrying out functions that are not now, and have never been, carried out by the federal government (e.g. the private, not-for-profit Canadian Blood Services which took over the operation of the national blood system from the Canadian Red Cross).

The Task Force believes that there is a need for a principled approach to coverage under the Act, which would provide transparency and consistency in determining the organizations to be added to Schedule I. These principles for coverage should allow a degree of flexibility to accommodate the diverse mandates and operations of possible additions to the Schedule, and to accommodate changes in the future as governments develop innovative ways of achieving public policy purposes.

There needs to be clarity on what entities are covered by the *Act*, and why. [ ] There needs to be consistency so that government can decide on inclusion in a coherent fashion, and explain and defend its decisions in public.

Jerry Bartram
Research Report 12

It is our view that the best way to ensure appropriate coverage in a principled and pragmatic way is to determine whether a particular organization should be subject to the Act by applying criteria based on ownership and control and whether a public function is carried out.[1] Most jurisdictions already include ownership and control criteria in their freedom of information legislation. This presumes a right to examine information held by organizations owned or controlled by government. More recent freedom of information statutes include the public function criteria as well, which begin with the premise that entities performing government services should, in the interest of transparency and accountability, be open to public scrutiny.

Much has changed in public governance since the introduction of *ATI*, and much will change in the next 20 years as government works out different ways of achieving public purposes through innovative means. There needs to be sufficient flexibility for government to be able to treat *Access* as part of an overall approach to disclosure and accountability.

Jerry Bartram
Research Report 12

We believe the combined criteria better meet the challenge of ever-changing alternative service delivery initiatives. These should include:

- ownership and control: government appoints a majority of the members of the organization's governing body, provides all the organization's financing through appropriations, or owns a controlling interest in the organization; and
- public functions: the organization performs functions in an area of federal jurisdiction with respect to health and safety, the environment, or economic security.

Any organization meeting either the ownership and control or the public function criteria could be added to Schedule I unless coverage is incompatible with either its:

- governance structure (e.g. an arrangement where provinces are responsible along with the federal government for a particular function, making it difficult or inappropriate to apply the federal Act to the new structure); or
- mandate (e.g. information critical to the mandate of the enterprise could not be protected by exemptions or exclusions under the Act).

2.1 The Task Force recommends that:

- **the Act be amended to set out criteria to be taken into account in determining what institutions should be covered under the Act;**
- **the criteria provide that institutions may be covered if**
  - **government appoints a majority of board members, provides all of the financing through appropriations, or owns a controlling interest, or**
  - **the institution performs functions in an area of federal jurisdiction with respect to health and safety, the environment, or economic security;**
  - **except where coverage would be incompatible with the organization's structure or mandate.**

It is our view that these criteria should be applied to existing and proposed alternative service delivery organizations. A preliminary analysis indicates that this approach could bring all Crown corporations under the access regime. However, the coverage of Crown corporations, their subsidiaries, and other alternative service delivery organizations, should be determined on a case-by-case basis, following a more comprehensive review.

If it is determined that an existing organization meets the criteria, we also believe that it should not be added to Schedule I until it has been given sufficient time to prepare its new access to information regime.

2.2 The Task Force recommends that:

- **a comprehensive review of existing alternative service delivery organizations be undertaken to determine whether they meet the criteria; and**
- **the Act only be extended to existing organizations that meet the criteria following a reasonable period of time to prepare their new access to information regime.**

Many organizations not presently subject to the Act have mandates that may be partially at odds with coverage. However, we believe that information critical to the mandates of these organizations can be protected in most instances by specifically excluding it from the Act while maintaining general coverage of the entity. This targeted approach is taken in many jurisdictions. One example of critical information, recognized by the 1986 Parliamentary Committee, is the Canadian Broadcasting Corporation's program material. Another is information about the competitive commercial activities of Crown corporations such as Canada Post (e.g. courier business) and the Mint (e.g. jewellery sales). These activities are clearly distinguishable from the corporations' public policy functions. It is the view of the Task Force that information of this nature should be specifically excluded where the organization is otherwise covered by the Act.

2.3 The Task Force recommends that the Act not apply to information relating to critical interests of organizations already covered or to be covered by the Act (e.g. journalistic sources, competitive commercial activities), where the current exemptions would not adequately protect such information.

To ensure that a principled approach to coverage will work, it is important that the question of the application of the Act be considered very early and in a consistent way when decisions are being made to create new organizations. This does not seem to have always been the case in the past. However, the government's new *Policy on Alternative Service Delivery*[2] (ASD Policy) offers an opportunity to do so. It requires that all proposed ASD initiatives be subject to a case analysis that involves, among other things, a number of "public interest" tests including whether the *Access to Information Act* should apply. This approach has the potential to ensure that the issue of coverage is considered early in the process and in a rigorous manner. However, it should be strengthened to match the principled approach proposed by the Task Force.

In addition to criteria being included in the Act, therefore, we believe that the criteria and several guiding principles should be included in the ASD Policy and Policy Guide, to be used in determining whether the Act should apply to a new organization.[3]

Where, in applying the criteria, it is determined that it would not be appropriate for the new organization to be covered by the Act, the ASD Policy should require that the organization establish an alternate disclosure regime in order to ensure public access to information.

2-4 The Task Force recommends that the government's *Policy on Alternative Service Delivery* and *Policy Guide* be amended:

- **to include the criteria for coverage under the Act, along with guiding principles, in order to ensure a full analysis of the issue of coverage when new alternative service delivery organizations are created; and**
- **to provide that where coverage under the Act is not appropriate, an alternate and comprehensive disclosure regime be put in place.**

The Legislature

Parliament

The view of the 1986 Parliamentary Committee was that access to information legislation should apply to public institutions that the general public perceives to be part of the institutional machinery of government, including the Senate, the House of Commons (except for the offices of Senators and Members of the House of Commons), and the Library of Parliament. This recommendation was supported by successive Information Commissioners.

The Parliamentary Committee also referred to the need to protect parliamentary privilege. Parliamentary privilege is the collective and individual rights accorded to parliamentarians to ensure they are able to carry out their functions and perform their duties without obstruction. The privilege is protected by the Constitution and extends to all matters relating to parliamentary proceedings. This includes a Member's right to freedom of speech, the House's entitlement to regulate its own internal affairs and a Committee's right to call witnesses.

We believe that the Act should apply to information about the administrative operation of the institutions of Parliament, namely, the House of Commons, the Senate and the Library of Parliament. However, we also believe that exceptions should be made for information that would be protected by parliamentary privilege. It is our view that this protection is necessary to ensure that the Senate and House of Commons function independently and effectively. Nor should the Act apply to the information of political parties or their caucuses, or to the personal, political and constituency records of individual Senators and Members of the House of Commons.

> Absolute privilege ensures that those performing their legitimate functions in these vital institutions [Parliament and the courts] shall not be exposed to the possibility of legal action. This is necessary in the national interest and has been considered necessary under our democratic system for hundreds of years. It allows our judicial system and our parliamentary system to operate free of any hindrance.
>
> Former Speaker John Fraser
> Debates, May 5, 1987

To ensure its autonomy from the executive and the courts, and to protect its immunities and privileges, Parliament may wish to consider a modified redress process to resolve complaints about the handling of requests for its records. Should Parliament be of the view that judicial review by the Federal Court would be incompatible with its independence, a second tier review following the complaint stage could be undertaken by Parliament itself. In other words, the first stage of the usual redress process could apply – a requester would have the right to complain to the Information Commissioner, and the Commissioner would be able to investigate the complaint and make recommendations to the appropriate parliamentary institution. Any second tier review, however, could be done by Parliament – for example, by a "blue ribbon" panel of current or former parliamentarians appointed jointly by the two Houses of Parliament. The panel, in turn, could make recommendations to the Speakers of each House who are the recognized authorities on parliamentary privilege.

The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.

Madame Justice McLachlin in *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319

2-5 The Task Force recommends that:

- **the Act apply to the House of Commons, the Senate and the Library of Parliament;**
- **the Act exclude information protected by parliamentary privilege, political parties' records and the personal, political and constituency records of individual Senators and Members of the House of Commons; and**
- **Parliament consider whether the appropriate second tier of the redress process is judicial review following a complaint investigation by the Information Commissioner, or some type of review by Parliament itself. For example, a panel of experienced parliamentarians could be appointed to review situations where the Commissioner recommends disclosure but the House of Commons, the Senate or the Library of Parliament maintains the information requested is protected by parliamentary privilege.**

Officers of Parliament

An officer of Parliament is responsible to the House of Commons, the Senate, or both Houses of Parliament, for carrying out certain statutory duties. Parliamentary Officers include the Chief Electoral Officer, the Auditor General, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner.

The Auditor General, the Information Commissioner and the Privacy Commissioner all expressed concern about the possibility that coverage would require them to disclose information provided to them by other institutions in the course of their audits or investigations, or information generated internally in the course of those audits or investigations.

The Task Force is of the view that the Act should apply to the Auditor General, the Commissioner of Official Languages, and the Information and Privacy Commissioners. We also believe that their concerns about coverage should be addressed in the Act.

The Chief Electoral Officer's mandate differs in that he does not oversee the activities of the executive in the way that other parliamentary officers do. To the contrary, the Chief Electoral Officer oversees Elections Canada, which is the non-partisan agency responsible for the federal electoral system. The *Canada Elections Act* already governs disclosure and non-disclosure of election documents and information relating to investigations. Coverage under the *Access to Information Act* could lead to conflicting provisions. The Task Force concluded, therefore, that the Chief Electoral Officer should not be covered by the Act. However, we believe that provision for access to information about the administration of the Office of the Chief Electoral Officer, and a mechanism to resolve any related disputes, should be added to the existing disclosure regime in the *Canada Elections Act*.

2-6 The Task Force recommends that:

- **the Act apply to the Offices of the Auditor General, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner;**
- **the Act exclude records relating to the exercise of a parliamentary officer's audit or investigation functions, or other government institutions' records under the custody of a parliamentary officer strictly for the purposes of an audit or investigation; and**
- **the *Canada Elections Act* be amended to provide for access to information about the administration of the Office of the Chief Electoral Officer, and a mechanism to resolve any related disputes.**

The question has also arisen about how complaints lodged under the Act against the Office of the Information Commissioner should be handled. In both Alberta and British Columbia, for example, the legislation provides for a judge to be designated to investigate any complaint made against the Commissioner. The alternative is a one-step redress process where the requester would bypass the investigative stage and go directly to court for judicial review of the Information Commissioner's decision not to disclose records, to charge fees, etc. It is our view that this formal approach would cost the requester much more in both time and money.

We believe that an approach similar to that in the provinces would be appropriate at the federal level. However, to minimize any perceived or real conflict of interest where the same Federal Court judge could investigate a complaint against the Office of the Information Commissioner and conduct judicial reviews under the Act, we concluded that a retired judge could be designated to investigate such complaints. We expect these cases to be rare.

2-7 The Task Force recommends that the Act provide for the designation of a retired judge to investigate access to information complaints against the Office of the Information Commissioner.

The Courts and the Judiciary

The Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada are constituted by Act of Parliament. The federal government appoints judges to these courts and to the superior courts of the provinces and territories. There are, in addition, two related institutions. The Canadian Judicial Council, composed of the Chief Justices and Associate Chief Justices of the federal courts and the superior courts of the provinces and territories, is concerned, among other matters, with judicial discipline. The Office of the Commissioner for Federal Judicial Affairs is responsible for administering the salaries and benefits of federally appointed judges across Canada (apart from the judges of the Supreme Court), and provides administrative support for the appointments process.

In the case of the judiciary, the core value of judicial independence must be weighed against the possible societal value of information to be obtained from inclusion. The study notes that inclusion of the Office of the Commissioner for Federal Judicial Affairs may provide access to purely administrative records without including court records or processes. However, the study urges caution in including the judiciary at all, particularly since it is not clear where a line can be drawn between the judicial function and administrative matters.

Jerry Bartram
Research Report 12

The 1986 Parliamentary Committee recommended that the Act not be extended to the three federally-constituted courts. In his latest annual report, the Information Commissioner has taken the same position, noting that the courts, which must adjudicate complaints under the Act, should not themselves be subject to it or to investigation by his Office. He further notes that court proceedings are already open to the public to a much greater degree than the activities of other institutions.

The Task Force agrees with this assessment. Coverage of the courts and the judiciary under the Act would not be appropriate. To further ensure judicial independence, the Act should not apply to the Canadian Judicial Council or the Office of the Commissioner for Federal Judicial Affairs. However, the courts and related institutions should be made more transparent than they are now by disclosing administrative records, as a matter of course, as well as on request.

2-8 The Task Force recommends that the courts and related institutions not be subject to the Act, but that they adopt alternate and comprehensive disclosure regimes to ensure as much transparency as possible with respect to their administration.

Conclusion

The structure of government institutions has changed a great deal since the Act was passed. Coverage under the *Access to Information Act* is now narrower than in most other jurisdictions. Moreover, there is no clear public policy rationale, nor any criteria, for including or excluding existing and new institutions. The Task Force is of the view that most institutions in the executive branch should be included, unless coverage is inappropriate given their structure, or there is a risk of harm to their mandate that cannot be avoided by applying exemptions or exclusions. Toward this end, criteria should be set out in the Act so that organizations meeting the criteria may be added to Schedule I.

We believe that coverage should also be extended, along with appropriate protections, to the Senate, the House of Commons, the Library of Parliament, and parliamentary officers such as the Auditor General, the Commissioner of Official Languages, and the Information and Privacy Commissioners.

Finally, it is our view that institutions which are not made subject to the Act, including the courts, should nevertheless be encouraged to adopt alternate, comprehensive disclosure regimes. These regimes should aim to ensure the highest possible degree of transparency.

---

[1] Jerry Bartram, *The Scope of The Access to Information Act: Developing consistent criteria for decisions respecting institutions*, Research Report 12.

[2] Treasury Board Secretariat, *Policy on Alternative Service Delivery*, February 2002 (http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_B4/asd-dmps_e.html)

[3] For a fuller discussion, see Jerry Bartram, *Maintaining the public right of access to information when service delivery models change*, Research Report 13.

Chapter 3 – Looking at Scope: Records Covered by the Act

The *Access to Information Act* applies to a record under the control of a government institution. What is a "record" for the purposes of the Act? What information should be considered to be "under the control" of a government institution?

Definition of a Record

Section 3 of the Act defines "record" as follows:

> "record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.

There have been several recommendations over the years to add to the definition of "record" specific types of recorded information such as voice mail, electronic mail, electronic data interchange, computer conferencing and other electronically-stored communications. However, the Task Force is of the view that the current definition already includes all those types of records, regardless of the medium. The current definition also mirrors the broad definition of "record" in the *National Archives of Canada Act*. We believe that nothing would be gained by amending the definition.

The concerns expressed to the Task Force, however, seem to point to a lack of understanding of the definition of "record," and its application in practice. Public servants who create, maintain and dispose of records should have a clear understanding of what records are covered by the Act. We will return to the issues of information management, and training and tools for public servants, in Chapter 9.

3-1 The Task Force recommends that the definition of "record" in the Act remain unchanged since it is already comprehensive, but its meaning be better communicated to public servants.

Under the Control of a Government Institution

To be covered by the Act, a record must be "under the control of a government institution." Does this mean that all information a government institution possesses should be considered to be under its control? Conversely, should information not in the possession of a government institution nonetheless be considered to be under its control? If so, in what circumstances?

The Act does not define "control." The Treasury Board guidelines make it clear that a record in the physical possession of an institution, whether inside or outside Canada, is presumed to be under its control unless there is evidence to the contrary. The leading Canadian case on the issue is *Canada Post Corp. v. Canada (Minister of Public Works)*.[1] The Federal Court of Appeal held that the notion of control was not limited to the power to dispose of a record. The Court found there was nothing in the Act that indicated that the word "control" should not be given a broad interpretation, and that a narrow interpretation would deprive citizens of a meaningful right of access under the Act.

Other jurisdictions have developed more explicit guidelines on the meaning of control which are helpful for both public servants and requesters. The Alberta guidelines, for example, indicate that a record is under the control of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition. The guidelines set out a number of indicators that a record may be under the control (or in the custody of) a public body. These include: the record was created by or on behalf of a public body; the record is specified in a contract as being under the control of a public body; the record is in the possession of the public body; and the public body has the authority to regulate the record's use and disposition.

In our consultations, federal Access Coordinators made the point that government institutions currently have no clear understanding of what is "under the control." The Coordinators told us that the lack of clear guidelines in this regard has led to divergent opinions and formal complaints. The Task Force agrees that more guidance on this issue is required.

We also agree with the view of the former Ontario Information and Privacy Commissioner[2] that it is not possible to establish a precise definition of the word "control" and simply apply the definition in each case. As the Commissioner suggested, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether control has been established, looking at the particular circumstances.

Guidelines can help provide this kind of practical, detailed direction to those responsible for implementing the Act. There are several provincial examples that the federal government could emulate. Clearer guidelines, combined with training for access to information officials on this issue, should help to solve most cases readily and avoid needless disputes.

3-2 The Task Force recommends that the *Access to Information Guidelines* be amended to provide more detailed guidance on the meaning of the expression "under the control."

Contractors' Records Related to the Delivery of Government Programs and Services

There has been an increase in recent years in the contracting-out of federal programs and services to the private sector. These are not normal contracts to obtain goods and services for government use, but contracts or arrangements involving the transfer of the delivery of a program or service, previously delivered by the government, to a contractor for a specified period. For example, an institution could contract out its entire information technology function to a private enterprise, or pay a private company to perform technical inspections on its behalf. However, the accountability for the functions remains with the government. It should also be noted that the performance of these functions may be a relatively small part of the private sector contractor's activities.

In Chapter 2, we discussed the government's *Policy on Alternative Service Delivery* (ASD). The ASD Policy also applies to the contracting-out of federal programs and services. Like other ASD initiatives, the Policy for these situations requires institutions proposing to contract out programs or services to prepare a case analysis. Among other things, this analysis involves several "public interest" tests, including how the access to information rights of Canadians will be maintained.

The Task Force concluded that the government's ASD Policy should be amended to apply the proposed criteria for coverage under the Act to new ASD organizations. For "contracting out" initiatives, the approach should not be to bring private sector companies under the Act because they are delivering government programs or services for a time under contract. Rather, it should be to ensure that Canadians continue to have access to records relevant to the government's accountability for the program or service.

3-3 The Task Force recommends that the government's *Policy on Alternative Service Delivery* be amended to ensure that arrangements for contracting out the delivery of government programs or services provide that:

- **records relevant to the delivery of the program or service that are either transferred to the contractor, or created, obtained or maintained by the contractor, are considered to be under the control of the contracting institution; and**
- **the Act applies to all records considered to be under the control of the contracting institution, and the contractor must make such records available to the institution upon request.**

Contracting with private sector bodies for the provision of services directly to the public on behalf of government poses a potential threat to the government accountability and openness provided by the FOI Act.

Australian Law Reform
Commission Report 77

Alternate service delivery, whereby institutions enter into arrangements to provide government services through a private sector contractor, also poses a threat to access rights. [The previous Commissioner] recommended a government framework which would include the requirement for a written contract between the institution and private service provider explicitly maintaining the application of the Acts to records necessary for the performance of the service.

Ann Cavoukian
Ontario Information and
Privacy Commissioner
Submission to the Task Force

Records in Ministers' Offices

The Act states that it applies to records "under the control of a government institution." It makes no special provision for Ministers' offices, but does distinguish, in other contexts, between government institutions and Ministers and their exempt staff. The government has consistently interpreted the relevant provisions of the Act as meaning that a Minister's office is separate and apart from the "government institution" or department over which the Minister presides, so the Act does not apply to records held exclusively in a Minister's office.

The Information Commissioner does not agree with this interpretation. His view is that the Minister, as head of the government institution, is part of the department, and the Act should apply to records in a Minister's office other than those of a personal or political nature. At the time of writing this report, the issue was before the courts.

Other jurisdictions' legislation is generally more explicit. Two approaches are used to exclude records in Ministers' offices. Under the first approach, records in Ministers' offices are generally excluded unless they are connected to the institution because the records either came from the department or were sent to the department by the Minister's office. Under the second approach, the legislation covers Ministers' offices, but excludes specific kinds of records.

The *Access to Information Act* is legislation intended for the use of all Canadians, and the plainer its rules the better. Therefore, we believe a more explicit approach would be preferable.

It is the view of the Task Force that the application of the Act to records in Ministers' offices should be elaborated upon in the Act. Since the matter is currently before the courts, however, there may be some benefit to awaiting the courts' substantive ruling before proposing any amendment to the Act.

We also believe that the staff in Ministers' offices should receive training so they are better aware of institutions' obligations under the Act (this is a recommendation we make again in Chapter 11), and of the National Archives of Canada guidelines[3] for the proper and separate management of ministerial and institutional records.

3-4 The Task Force recommends that

- **the status of records in Ministers' offices be dealt with more explicitly in the Act; and**
- **training be provided for ministerial staff on records management and access to information.**

Public Servants' Notes

Another issue brought to our attention is the need to clarify to what extent notes created by public servants for their exclusive use should be considered to be under the control of a government institution, and therefore subject to the Act. These are notes, for example, used by public servants to record their thoughts, or as "memory joggers."

The underlying principle must certainly be that records created by public servants in the course of, and for the purposes of their work, are subject to the Act, and therefore accessible unless subject to an exemption or an exclusion. In short, public servants create government records and in Chapter 9 we discuss the need to heighten their awareness of this fact. The question is how best to make the distinction between government records – and notes for a person's own use – clear and helpful.

Other jurisdictions have wrestled with this issue. To our knowledge, Quebec is the only jurisdiction that has addressed it in its legislation: Section 9 of *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information* provides that the right of access to the documents held by a public body "does not extend to personal notes written on a document or to sketches, outlines, drafts, preliminary notes or other documents of the same nature."

The United States' *Freedom of Information Act* applies to "agency records," a term which is not defined in the Act. However, the courts have held that the personal records of an individual agency employee are not "agency records." The U.S. courts have identified several questions relevant to distinguishing between agency and personal records. These questions include, for example, whether the author created the document solely for their personal convenience, rather than to facilitate agency business; whether they distributed the document to anyone else; and whether they kept possession of the document or placed it on an official agency file.

The Task Force is of the view that the Act should not apply to notes made by public servants for their own use as "memory joggers." On the other hand, we believe that the Act should apply to notes shared with others, or that are placed on office files. In our view, the Act should also apply to notes used in an administrative decision-making process that affects the rights of individuals, or in a government decision-making process reflected directly in policy, advice or program decisions.

3-5 The Task Force recommends that:

- **the Act be amended to provide that records "under the control of a government institution"**
  - **do not include notes prepared by public servants for their own use, and not shared with others or placed on an office file;**
  - **do include such notes when they are used in an administrative decision-making process that can affect rights, or in a decision-making process reflected directly in government policy, advice or program decisions; and**
- **the *Access to Information Guidelines* be amended to elaborate on the scope of public servants' notes, and set out considerations to be taken into account by public servants and Access Coordinators in differentiating between public servants' own notes and records subject to the Act.**

Deliberations of Administrative Tribunals

Tribunals such as the Canadian Human Rights Tribunal, like the courts, make decisions touching on a broad range of citizens' rights. The deliberative process of these bodies is also similar to that of courts. There is therefore the same need to prepare hearing notes, and analyses of the issues, and to draft decisions independently and in confidence.

The lack of protection for the deliberations of administrative boards and tribunals covered by the Act is a source of concern. This concern persists despite a Federal Court of Appeal decision[4] that notes taken by members of the Canada Labour Relations Board in the course of quasi-judicial proceedings are not under the control of the Board itself. We believe the need to protect these notes is self-evident, and the silence of the Act on this point was probably an oversight that should be remedied.

3-6 The Task Force recommends that the Act exclude notes, analyses or draft decisions created by or for a person who is acting in a quasi-judicial capacity as a member of an administrative board or tribunal.

Records Within the Military Justice System

The Act applies to the Canadian Forces and the Department of National Defence in their entirety, despite the fact the Canadian Forces have a military justice system which is separate from, but parallel to, the broader criminal justice system. This military justice system includes criminal investigators, an independent prosecution service, an independent defence bar, a military judiciary and service tribunals that judge both specific military offences and criminal matters.

The Task Force is of the view that the judicial and quasi-judicial functions within the military justice system should have the same protection as that proposed for administrative tribunals.

3-7 The Task Force recommends that the Act exclude notes, analyses or draft decisions created by or for a person who is acting in a judicial or quasi-judicial capacity within the military justice system.

Seized Records and Records Obtained in the Context of Litigation

There is also a need to clarify that the Act does not apply to records obtained by the government in the context of criminal investigations or litigation involving the Crown. This would include records seized by a government institution under the Criminal Code or other federal statute. Those laws already set out rules governing detention and ultimate return of the records.

This clarification should also include records obtained by a government institution from a third party as part of the discovery process in the context of civil litigation. The law provides that such documents are produced in accordance with the understanding that they are confidential. The information is not to be used for purposes other than the litigation and any failure to comply is a contempt of court. Such records are usually required to be returned once the litigation is completed.

3-8 The Task Force recommends that the Act exclude records seized in the course of a criminal investigation, and records obtained by the government in a civil proceeding under an implied undertaking of confidentiality.

Conclusion

The need for greater clarity about the Act, and its application, is a recurring theme in this report. This clarity can be achieved through amendments to the Act itself (e.g. to state expressly that it does not apply to quasi-judicial notes) or by developing more detailed policy and guidelines (e.g. as to the meaning of "under the control of a government institution"). The Task Force believes that such clarity will help public servants and requesters better understand the Act's scope, resulting in fewer disputes.

---

[1] *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.)

[2] Commissioner Sidney B. Linden, Order 120, November 22, 1989, at 6

[3] National Archives of Canada, *Guidelines for Managing Recorded Information in a Minister's Office*, (Minister of Supply and Services Canada, 1992). (http://www.archives.ca/06/0603_e.html)

[4] *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)* [2000] F.C.R. (C.A.)

Chapter 4 – Striking the Right Balance: Exemptions and Exclusions

All countries with access to information laws must balance the citizen's right to know with the need to preserve confidentiality where disclosure of information would be against the public interest.

Public interest is always the key factor in determining whether a requested record should be disclosed. The purpose of the exemptions and exclusions in the *Access to Information Act*, therefore, is to define in a narrow and specific way those instances where the public interest may lie in the protection of information. The right balance has to be achieved in each exemption and exclusion as well as in the overall structure of exemptions and exclusions. The Act must be looked at in its entirety to fully appreciate the delicate balancing of public interests that it embraces.

> Of course, access rights are not absolute. They are subject to specific and limited exemptions, balancing freedom of information against individual privacy, commercial confidentiality, national security and the frank communications needed for effective policy-making.
>
> Information Commissioner
> Annual Report 2000-2001

Does the Act's existing exemption/exclusion structure continue to strike the appropriate balance between disclosure and protection? In assessing the structure, we carefully studied previous proposals for the reform of the Act, and the legislative schemes in several provincial and international jurisdictions. We have also drawn on a comprehensive research report prepared for the Task Force on the overall legislative scheme for protecting information.[1]

To better illustrate the scheme in the Canadian legislation, we have grouped together the provisions related to the government's deliberative processes, as well as those related to national security, defence and law enforcement. All other exemptions and exclusions are looked at in the order in which they appear in the Act.

Exemption/Exclusion Structure

The principle of the Act is that a requester has a right to obtain records under the control of a government institution, and those records can only be withheld according to limited and specific exceptions. These exceptions are the individual exemptions in Sections 13-26 of the Act and the exclusions in Sections 68 and 69. The structure for protecting information can be summarized as follows:

- As with most freedom of information legislation, some exemptions are injury-based, while others are class exemptions. Before the exemption can be applied, injury-based exemptions require the head of a government institution to identify the harm to the interest (e.g. the conduct of international affairs) that could reasonably be expected to result from disclosure. The courts have interpreted this to mean that there must be a reasonable expectation of probable harm. Class-based exemptions, on the other hand, require only that the information fall within a specified group or type (e.g. personal information). There is no legislative requirement to identify an injury that would likely result from disclosure. This is presumed to be the case.

- While a few exemptions are mandatory, most are discretionary. If an exemption is mandatory, the head of an institution "shall refuse" to disclose the record or records concerned (e.g. the trade secrets of a third party). He or she has no choice. The public interest is presumed to lie in withholding the information. If an exemption is discretionary, the head of an institution has the discretion to refuse to disclose a record in responding to a request. For example, under Section 23, the head of a government institution "may refuse" to disclose information that is subject to solicitor-client privilege. The head of the institution must balance two things: the public interest in releasing the information, and the public interest in preserving the privilege that this provision is intended to protect.
- Some exemptions are subject to an express injury test. Others are not. It is our view that Parliament expressly included an injury test only where it intended that a very specific injury be considered. We also believe that the need to consider possible harm or injury is implied when public interests are being balanced in all discretionary exemptions.
- The fact that a record contains information that should be protected under one of the exemptions does not mean the record can be withheld in its entirety. Section 25 requires the head of a government institution to disclose any information in the record that does not fall within the exemption, and that can reasonably be severed.

The table below indicates, for each exemption, whether it is mandatory or discretionary, and whether it is class-based or subject to an injury test. (The corresponding provisions in the Act are indicated in brackets.)

	Class test	**Injury test**
Mandatory exemptions	• Information received in confidence from other governments (s.13) • Information obtained or prepared by RCMP re: provincial or municipal policing services (s.16(3)) • Personal information (s.19)* • Trade secrets of Third Party (s.20(1)(a)) • Financial, commercial, scientific or technical information received in confidence from Third Party (s.20(1)(b))* • Information protected under other, listed statutes (s.24)	• Loss or gain to Third Party or prejudice to competitive position (s.20(1)(c))* • Interference with contractual or other negotiations of Third Party (s.20(1)(d))*
	Class test	**Injury test**
Discretionary exemptions	• Information obtained or prepared by listed investigative bodies (s.16(1)(a)) • Information on techniques or plans for investigations (s.16(1)(b)) • Trade secrets or valuable financial, commercial, scientific or technical information of Canada (s.18(a)) • Advice or recommendations to government (s.21(1)(a)) • Account of consultations or deliberations (s.21(1)(b)) • Government negotiation plans (s.21(1)(c)) • Government personnel or organizational plans (s.21(1)(d)) • Solicitor-client privileged information (s.23) • Information to be published in 90 days (s.26)	• Injury to conduct of federal-provincial affairs (s.14) • Injury to conduct of international affairs, or to defence of Canada or allied states (s.15) • Injury to law enforcement or conduct of lawful investigations (s.16(1)(c)) • Harm in facilitating commission of criminal offence (s.16(2)) • Threat to individual's safety (s.17) • Prejudice to competitive position of government (s.18(b)) • Harm in depriving government researcher of priority of publication (s.18(c)) • Injury to financial or economic interests of Canada (s.18(d)) • Prejudice to use of audits or tests (s.22)

** Denotes mandatory exemptions which include a public interest override, i.e., the information may be disclosed where the public interest in disclosure outweighs the interest protected by the exemption .*

[T]he use of mandatory exemptions in the *Access to Information Act* is not excessive and is fairly consistent with the approach in other jurisdictions.

Barbara McIsaac
Research Report 17

Mandatory vs. Discretionary Exemptions

It has been suggested in the past that all exemptions should be discretionary in nature, except the exemption for personal information.

But it is our view that mandatory exemptions should not be converted wholesale to discretionary exemptions. The reason for making them mandatory in the first place is still valid: the information is regarded as belonging to a party other than the government (i.e. another government, an individual or a commercial entity). We also note that most of the jurisdictions we studied, in Canada and elsewhere, have mandatory exemptions covering the same or similar kinds of information.

Injury Tests

Those commentators who recommended converting all exemptions to discretionary ones, also suggested that each exemption be expressly subject to an injury test. As mentioned earlier, a number of discretionary exemptions already include a specific injury test. It is our view that this was done only where the anticipated injury or harm could be clearly expressed. In other words, there are no injury tests mentioned where they would be too vague to be used effectively. For example, any injury test specified for the advice or recommendations exemption in Section 21 would be very broad – injury to the efficient conduct of a government institution's operations, or injury to the deliberative processes of a government institution.

Regardless of whether a discretionary exemption includes a specific injury test, we believe that the need to consider possible harm or injury is implied when public interests are being balanced by the head of a government institution (or their delegate) as part of the exercise of discretion.

General Public Interest Override

Two mandatory exemptions include specific public interest overrides which allow the head of a government institution to disclose information where this would be in the public interest as defined in the provision. Section 20(6), for example, permits the head of an institution to disclose commercial information from a third party if this would be in the public interest as it relates to health, safety or protection of the environment, and the public interest in disclosure clearly outweighs any injury to the third party. The exemption for personal information incorporates a similar public interest override from the *Privacy Act*.

[E]xperience shows that the public interest override has been applied sparingly, even in jurisdictions like British Columbia, where the override provision is broad and applies to all exemptions. A broader override provision may, then, not make much practical difference in that exemptions from disclosure, if properly justified, are not likely to be overridden in any case.

Murray Rankin,
Kathryn Chapman
Research Report 19

The Ontario legislation includes a general public interest override which provides that certain exemptions do not apply where a compelling public interest in the disclosure of a record clearly outweighs the public interest that the exemption is intended to protect.

We believe that a general public interest override is not necessary. Discretionary exemptions already imply a balancing of the public interest in protecting the information, and the public interest in disclosure, and the mandatory exemptions for third party and personal information already include specific overrides. It is also our view that a general override would not result in greater disclosure of information. In fact, there is some indication that Information Commissioners in other jurisdictions are hesitant to invoke such sweeping provisions.

Positive Duty to Disclose

The legislation in some provinces includes a provision which imposes a duty on the head of a government institution to disclose information, even in the absence of a request, where it is in the public interest to do so, and/or the information reveals a grave environmental, health or safety hazard to the public.

Our rationale for not adding a general public interest override to the Act applies equally to the public interest component of a positive duty to disclose. Also, it is our view that such statutory duties are more effective when they are included in specific legislation pertaining to health, safety and the environment.

Interpretation and Application of Exemptions – the Exercise of Discretion

While we have concluded that the overall structure is sound, this does not mean that the outcomes that Parliament intended are always achieved. It is our view that this is not so much due to the general structure of the Act, or even the specific exemptions or exclusions. Rather, it is due to the way discretionary exemptions are understood and applied.

Many stakeholders feel that although the essence of the Act is sound, it continues to be applied inconsistently and in such a way as to contradict the principles of openness, transparency and accountability that underlie it.

Report on Consultations to Review the Access to Information Act and its Implementation

The exercise of discretion inherently implies a consideration of the factors relevant in each particular case, including any anticipated harm from disclosure. However, it is our impression that heads of government institutions (or their delegates) do not always consider all relevant factors in exercising their discretion, nor do they articulate clear reasons for withholding information. We found that this is a problem in all the jurisdictions we consulted.

The challenge is to find ways to bring the practice more in line with the intent of the Act. We believe that institutions should consider whether an identifiable harm could result from disclosure, regardless of whether a particular exemption includes a specific injury test. We also believe that, in exercising discretion, institutions should consider the fact that information usually becomes less sensitive over time. The most productive reform would be to find a way to ensure that discretion is exercised only after such consideration. An exemption would then be claimed only where good reasons can be articulated for withholding information.

With more guidance and with more thoughtful consideration of the factors that ought to be considered when deciding whether to invoke a discretionary exemption or not, it should be possible to construct a process whereby more information is made available and, when discretionary exemptions are claimed, there is a clearer understanding of why they have been claimed.

Barbara McIsaac
Research Report 17

The application of exemptions should not be a matter of intricate legal reasoning, but of basic questions asked consistently at all stages in the process: Are there good reasons for withholding the information in this case? How soon can it be made available without causing harm to one of the interests protected by the Act?[2]

It is our view, therefore, that improving the approach to the exercise of discretion is primarily a matter of education and attitudes. More guidance and training are needed. Working with the Information Commissioner, Treasury Board Secretariat could do more to develop user-friendly guidelines to help government institutions determine how to apply discretionary exemptions.

4-1 The Task Force recommends that guidelines be issued on how to apply discretionary exemptions by:

- **exercising discretion as far as possible to facilitate and promote the disclosure of information;**
- **weighing carefully the public interest in disclosure against the interest in withholding information, including consideration of any probable harm from disclosure, and the fact that information generally becomes less sensitive over time; and**
- **having good, cogent reasons for withholding information when claiming a discretionary exemption.**

4-2 The Task Force recommends that the proper exercise of discretion in applying exemptions be a major element in access to information training.

Specific Exemptions/Exclusions

Deliberative Processes of Government

The deliberative and decision-making process of government is protected under two sections of the Act: Section 69, which excludes Cabinet confidences from the application of the Act, and Section 21, which exempts advice to Ministers and the deliberative processes of institutions. These provisions are interrelated and should be looked at together.

Section 69 - Cabinet Confidences

Section 69 states that the Act does not apply to confidences of the Queen's Privy Council for Canada – which includes Cabinet and Cabinet committees. The Act does not define such confidences, but provides a list of examples including: Cabinet memoranda, agendas, records of decisions; communications between Ministers on matters relating to the making of government decisions or the formulation of government policy; pre-Cabinet briefings of Ministers and draft legislation.

In 2000-2001, Section 69 was claimed in 6% of all refusals to disclose (exemptions and exclusions).

Since the Act does not apply to Cabinet confidences, a decision of the head of a government institution that a record contains a confidence is final. The record concerned cannot be reviewed by the Information Commissioner or the Federal Court, unless it can be challenged on other grounds.

Section 69 has been the subject of strong criticism.

> The Committee heard more testimony on the need to reform this provision than on any other issue.
>
> Parliamentary Committee Report, 1987

The convention of Cabinet confidentiality, which is protected under Section 69, is fundamental to collective ministerial responsibility under the Canadian system of parliamentary and Cabinet government. Essentially, it is designed to ensure that Ministers can deliberate in confidence. The convention is actively observed in the day-to-day workings of government. All Ministers take an oath to give their advice freely and to safeguard the secrecy of all matters they discuss amongst themselves. When Ministers leave office, their Cabinet and related papers are sealed and are not accessible to a new government.

Moreover, Canada has a statutory regime that governs matters relating to the convention of Cabinet confidentiality in court proceedings. The *Canada Evidence Act (CEA)* sets out the rules governing witnesses and evidence in all criminal proceedings, as well as in civil and other proceedings over which Parliament has jurisdiction. Section 39 of the *CEA* provides for the exclusion of Cabinet confidences from production in relation to such proceedings. The definition of confidences in that provision is essentially the same as in the *Access to Information Act*. The Task Force recognizes that any changes to Section 69 of the Act must go forward together with changes to Section 39 of the *Canada Evidence Act* (and Section 70 of the *Privacy Act*).

> In Canada's Cabinet-parliamentary system, it is critical for full and frank discussion of policy options and for Cabinet solidarity that Cabinet ministers be able to deliberate in private and in confidence.
>
> Kenneth Kernaghan Research Report 4

The fundamental role of Cabinet in a Westminster parliamentary system of government such as ours is widely recognized, as is the need to protect the process of Cabinet decision-making. The issue is whether the need to protect Cabinet confidences justifies their absolute exclusion from the Act. Could confidences not be protected adequately in other ways? We believe that they could. Other Westminster-style jurisdictions, in Canada and abroad, provide strong protection for Cabinet confidences without excluding them from the scope of their legislation.

Our review shows that, in most jurisdictions, Cabinet confidences are protected by a mandatory class exemption. We believe this approach would be appropriate in the Canadian context as well. The Australian Law Reform Commission best expressed the rationale for choosing a mandatory exemption over a discretionary one: "It is not in the public interest to expose Cabinet documents to the balancing process contained in most other exemptions or to risk undermining the process of collective Cabinet decision-making."[3]

> Most freedom of information laws view the vital nature of Cabinet confidentiality in a parliamentary form of government as meriting a strong mandatory exemption.
>
> Information Commissioner Annual Report 2000-2001

4-3 The Task Force recommends that Cabinet confidences no longer be excluded from the Act and that they be protected by a mandatory class exemption.

A related issue is which records warrant this protection. We noted earlier that the Act does not define Cabinet confidences but provides a list of examples. Many people believe that this allows for an overly broad interpretation of the meaning of Cabinet confidence. By contrast, the legislation in most of the jurisdictions we studied focuses on protecting the substance of Cabinet deliberations. We believe this is the better approach.

4-4 The Task Force recommends that a definition of "Cabinet confidence" be added to the Act, focusing on information that would reveal the substance of matters before Cabinet, and deliberations between or among Ministers.

Not all material prepared for the consideration of Cabinet Ministers needs the strong protection required for the deliberations of Cabinet. The background material, factual information and analyses of issues provided to Ministers should be accessible, subject of course to other exemptions in the Act. However, this change would require that a new format be developed for Cabinet documents. It would also require that directives be given to public servants on the proper separation of facts from advice and recommendations in documents prepared for Cabinet. Irish officials told us that they were working on an electronic format for Cabinet documents that could allow for easy severance of factual information. The Canadian government should consider adopting this approach.

Similar provisions in other jurisdictions limit the protection for background explanations and analyses until the related decision is made public or five years have passed. It is our view that a protective period of five years is appropriate where the decision has not been made public.

4-5 The Task Force recommends that:

- **a prescribed format be developed for Cabinet documents that would allow for easy severance of background explanations and analyses from information revealing Cabinet deliberations such as options for consideration and recommendations; and**
- **the Act be amended to allow access to this background material once the related decision is announced, or after five years have passed, unless it contains information that should be protected under another exemption.**

Cabinet confidences are now accessible under the Act only after 20 years. The 1986 Parliamentary Committee and the Information Commissioner recommended that such confidences be protected by an exemption for 15 years. We think this is reasonable.

Any number is somewhat arbitrary: the jurisdictions we studied protect Cabinet confidences for time periods ranging from five to 30 years. As noted by the 1986 Parliamentary Committee, a 15-year period represents the life of at least three Parliaments. However, to the extent that Cabinet confidences are covered by other exemptions (e.g. harm to conduct of international affairs), they may be protected for longer than 15 years.

4-6 The Task Force recommends that the government consider reducing the protection for Cabinet confidences from 20 to 15 years.

A fundamental principle of the Act enshrined in Section 2 is that decisions on disclosure of government information should be reviewed independently of government. Cabinet confidences are not currently subject to independent review as they are excluded from the Act. Recognizing the special role that Cabinet plays in our parliamentary form of government, the 1986 Parliamentary Committee concluded that a special framework was needed to review Cabinet confidences. The Committee recommended that only a judge of the Federal Court be empowered to carry out this review. We endorse this recommendation.

> In light of the special status of the Cabinet in Canada's parliamentary form of government, the Committee believes that a special framework is required for this delicate task. Despite the extreme care that has been exercised by the Information Commissioner and the Privacy Commissioner in discharging their functions, the Committee is of the view that only a senior Federal Court judge should be able to examine Cabinet records....
>
> Parliamentary Committee Report, 1987

4-7 The Task Force recommends that a decision to refuse to disclose information on the basis that it is a Cabinet confidence be reviewable by the Federal Court.

Section 21 – Operations of Government

Section 21 accounted for 18.6% of exemptions claimed in 2000-2001.

The need to provide some protection for the internal decision-making processes of government is well-recognized. This need is reflected in the access to information regimes of all of the jurisdictions that the Task Force examined. The challenge is to protect what needs to be protected in the public interest, and no more.

Section 21 of the Act is a discretionary exemption allowing the head of a government institution to refuse to disclose a record containing:

- advice or recommendations developed by or for a government institution or a Minister;
- an account of consultations or deliberations involving officers or employees of a government institution, a Minister, or a Minister's staff;
- positions or plans developed for the purposes of negotiations, and considerations related thereto; and

> The public interest requires that a government receive advice which is confidential, in order to protect the neutrality of the civil service, and to ensure that its counsel is frank not fearful, full not partial, disinterested not partisan. Without the confidence of that kind of expert service, the quality of decisions would be lowered.
>
> Green Paper, 1977

- personnel management or administrative plans that have not yet been put into effect.

The exemption cannot be claimed for:

- an account of or statement of reasons for, a decision made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or
- a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of a Minister's staff.

The *Access to Information Guidelines* set out how this exemption should be invoked. The Guidelines urge institutions exercising their discretion under Section 21 to consider whether disclosing the information will result in injury or harm to the processes for providing advice or recommendations or carrying on consultations and deliberations.

Section 21 is the third most frequently claimed exemption. Requesters and commentators have criticized it for being too broad, and too broadly applied. No one disputes the need for government to conduct some deliberations in private and for ministers to receive the full and frank advice needed for effective policy-making. The issue is how to strike the right balance in the legislation, and in practice, between the principle of openness and the need for some confidentiality. We believe several changes should be made to improve this balance.

A first improvement would be to restrict the scope of Section 21. A wide class of documents prepared for the purposes of the deliberative process within government can obviously be made public, without harming the public interest. Several provinces provide a list of the kind of information not covered by the exemption. This approach has the added benefit of clarifying the nature of the information the exemption is meant to protect.

✓

Drafting briefing notes that separate policy advice from background facts to allow for easy severance.

There is, of course, a danger that listing the types of information that are not protected might lead officials to protect any information not on the list. On balance, however, we believe that amending Section 21(2) of the Act to extend the list of unprotected records is a good idea.

4-8 The Task Force recommends that the Act be amended to clearly state that the exemption in Section 21 does not apply to the following records:

- **factual material that in itself does not reflect the nature or content of advice;**
- **public opinion polls;**
- **statistical surveys;**
- **final reports or final audits on the performance or efficiency of a government institution or on any of its policies or programs;**

- **final reports of task forces, committees, councils or similar bodies established to consider any matter and to make reports to a government institution;**
- **appraisals (e.g. appraisal of a government institution's real estate holdings);**
- **economic forecasts;**
- **the results of field research;**
- **information that the head of a government institution has cited publicly as the basis for making a decision or formulating a policy; and**
- **substantive rules or statements of government policy that a government institution has adopted for the purpose of interpreting an Act or regulation or administering a program or activity.**

Records subject to Section 21 can be protected for up to 20 years. The 1986 Parliamentary Committee and the Information Commissioner have both recommended that this period be reduced to 10 years. We agree with this suggestion. In our view, reducing the protective period from 20 to 10 years is unlikely to compromise the frankness or candour of advice being provided to the government, the convention of ministerial responsibility, or the authority of Ministers.

4-9 The Task Force recommends that Section 21 be amended to reduce the protection of the exemption from 20 to 10 years (for other than not-yet-implemented personnel management or administrative plans).

Protection for a government institution's personnel management and administrative plans ceases once they have been implemented. The point has been made that if plans are rejected, or no decision relating to them is taken, they can stay protected for the full period specified for the exemption (now 20 years). This seems excessive to us. It is our view that the head of a government institution should have the discretion to protect such plans for a reasonable period of time, during which their status may change (e.g. work may cease and recommence a number of times) – but not longer than five years.

4-10 The Task Force recommends that Section 21 of the Act be amended to protect personnel management or administrative plans that have not been approved, or have been rejected, for no more than five years from the date of rejection, or the date on which work was last done on the plan.

Freedom of information legislation in Ontario and Quebec expressly extends protection to advice and recommendations of a consultant. Reports by consultants are likely protected in British Columbia, Alberta and Manitoba, where the exemption extends to advice and recommendations developed "by or for" a public body or Minister, with no express exception for consultants' reports parallel to paragraph 21(2)(b) of the federal Act.

David Stephens
Research Report 18

We believe that one additional amendment is required to modernize the scope of this exemption. Section 21 does not apply to reports from consultants. The practice of using consultants in government work has changed considerably in the past 20 years. They are now often involved in the policy development process, side by side with public servants, and are asked to provide critical strategic and policy advice to institutions and to Ministers. It is our view that the confidentiality of their advice or the deliberative process itself warrants protection in these cases. In other words, if the nature of the consultants' work is comparable to work done by public servants, it should be treated as such. This is the approach taken by the House of Commons in relation to a response to a Notice of Motion for Production of Papers.[4] Finally, the majority of jurisdictions we examined extend protection to consultants' advice and recommendations.

It should be made clear, however, that most consultants' reports would not qualify as advice or recommendations under this section.

4-11 The Task Force recommends that Section 21(2)(b) of the Act be repealed thereby allowing the exemption to apply to consultants' work where it fits within the parameters of the exemption.

National Security, Defence and Law Enforcement

Parliament recently enacted the *Anti-terrorism Act* as part of the response to the terrorist attacks that took place on September 11, 2001. The Act amended the *Canada Evidence Act* to allow the Attorney General to issue a certificate prohibiting the disclosure of information (in connection with a legal proceeding) for the purpose of protecting information obtained in confidence from or about foreign entities, or for the purpose of protecting national defence or national security.

The *Anti-terrorism Act* also amended the *Access to Information Act* by adding Section 69.1. This section excludes from the application of the Act information subject to a *Canada Evidence Act* certificate. The government has indicated that this exceptional protection for security information would be invoked only in rare instances. The certificates are subject to review by the Federal Court of Appeal. We have noted comparable protections for national security information in other jurisdictions.[5]

Other provisions in the *Access to Information Act* relating directly to issues of national security are those protecting: information obtained in confidence from other governments (Section 13); information the disclosure of which could injure international affairs, defence, or the detection, prevention or suppression of subversive or hostile activities, which include "terrorist acts" (Section 15); and information related to law enforcement or investigations, including information that could facilitate the commission of an offence. We believe that overall, these provisions are adequate and working well, but small changes are required to modernize and clarify them.

One addition to the Act is required from a national security standpoint. This would be to add information on critical infrastructure vulnerabilities to the third party information protected in Section 20. This recommendation is discussed further below.

Section 13 – Information Obtained in Confidence from Other Governments

Section 13 requires the head of a government institution to refuse to disclose a record containing information obtained in confidence from:

- the government of a foreign state;
- an international organization of states;
- the government of a province;
- a regional or municipal government; or
- in each case, an institution of that government or organization.

However, the information may be disclosed if the government, institution or organization from which it was obtained makes the information public, or if it consents to disclosure.

Section 13 accounted for 5% of exemptions claimed in 2000-2001.

Commentators have recommended that Section 13 be rewritten as a discretionary, injury-based exemption. In his most recent report, the Information Commissioner also suggested that a time limit of 15 years apply to all such confidences, unless the information related to law enforcement or security and intelligence matters, or was subject to extensive and active international agreements and arrangements.

[S]ection 13 addresses information received from foreign governments, sometimes in circumstances where Canada is dependent on the confidence that foreign governments have in Canada's ability and willingness to safeguard this information. On balance there appears to be too much potential for loss of this trust and goodwill if the exemption were to be changed to a discretionary one.

Barbara McIsaac
Research Report 17

After reviewing the issue and looking at the approaches in other jurisdictions, the Task Force is not convinced that such a step would be beneficial. The provision already has two important limits: the information must have been provided in confidence, and it can be released with the consent of its provider. Moreover, the *Access to Information Guidelines* encourage government institutions to contact the other government to seek its consent to disclose information protected by Section 13, where the government institution has some doubt as to the information's continuing confidentiality (e.g. a good deal of time has passed since the information was obtained). However, converting Section 13 to a discretionary, injury-based exemption would set Canada apart from its key allies and likely affect other governments' willingness to share information with Canada.

Section 13 also applies to an "aboriginal government" which is defined as meaning the Nisga'a Government. It has been suggested that this should be extended to all aboriginal organizations exercising governmental functions (e.g. Indian bands and tribal councils). However, we believe this may be premature because, unlike the provinces and most foreign governments, aboriginal organizations do not yet have disclosure regimes.

The extension of the exemption set out in Section 13 to all bodies exercising governance powers over Aboriginal peoples raises conflicting policy concerns, particularly since these bodies may not themselves be subject to any access requirements.

H. Foster, C. Parker, M. Rankin,
M Stevenson
Research Report 21

Each government should be responsible for controlling and releasing its own information.

Information Commissioner
Annual Report 2000-2001

Section 13 protects information received in confidence from a foreign state. There is some question about whether "foreign state" includes a subdivision of the state. For example, the 1986 Parliamentary Committee noted that some confusion had arisen as to whether state governments in the United States are included in Section 13. The Committee recommended an amendment to clarify that governments or agencies at the state or provincial level in other countries are covered by the exemption. The former and current Information Commissioners have supported this recommendation.

A related question is whether "foreign state" includes foreign entities that Canada does not recognize as states (e.g. Taiwan). We agree that the language of Section 13 should be clarified on these questions.

4-12 The Task Force recommends that Section 13 be amended to clarify that "foreign state" includes the political subdivisions of foreign states and other foreign authorities with which Canada has international and/or commercial relations.

Section 15 – International Affairs and Defence

Section 15 accounted for 5.4% of exemptions claimed in 2000-2001.

Section 15 is a discretionary, injury-based exemption relating to external affairs and defence. It gives the head of a government institution discretion to refuse to disclose any record containing information which, if made known, could reasonably be expected to harm:

- the conduct of international affairs;
- the defence of Canada or any state allied or associated with Canada; or
- the detection, prevention or suppression of hostile activities.

The more policy-making activity that takes place at the international level, the more relevant become those exemptions in domestic access to information law concerning international relations, diplomatic confidences, the affairs of foreign states and so on.

Colin J. Bennett
Research Report 3

Section 15 then goes on to list, "without restricting the generality of the foregoing," nine examples of such information. These include information relating to military tactics or strategy; the quantity, characteristics, capabilities or deployment of weapons or other defence equipment; and diplomatic correspondence.

Previous proposals and recommendations have focused on a perceived need to clarify the proper interpretation or application of the nine examples of information listed in the section. The Task Force is of the view that the current wording is clear. The overriding issue is whether an identifiable injury would result from disclosure. Section 15 lists the state interests that the exemption is intended to protect, or in other words, the interests that could be injured by disclosure. The nine examples are not intended to be an exhaustive list, and the current *Access to Information Guidelines* make this clear.

The Task Force does not recommend any changes to Section 15.

Section 16 – Law Enforcement and Investigations

Section 16 accounted for 8.1% of exemptions claimed in 2000-2001.

Section 16 is a complex provision. It contains three separate but related exemptions, with a mix of mandatory and discretionary, class and injury-based protections. In one case, there is a time limit. The three exemptions relate to law enforcement and investigations, security, and RCMP policing services. Past proposals have focused mainly on the exemptions for law enforcement and investigations.

Section 16(1) permits the head of a government institution to refuse to disclose:

- for up to 20 years, information obtained or prepared by a federal investigative body specified in the Regulations, in the course of lawful investigations pertaining to:
  - the detection, prevention or suppression of crime,
  - the enforcement of any law of Canada or a province, or
  - activities suspected of constituting threats to the security of Canada;
- information relating to investigative techniques or plans for specific lawful investigations;
- information the disclosure of which could reasonably be expected to harm the enforcement of any law of Canada or a province or the conduct of lawful investigations; or
- information the disclosure of which could reasonably be expected to harm the security of penal institutions.

Section 16(1)(a) protects information obtained or prepared in the course of a lawful investigation by a federal investigative body specified in the Regulations. The government institution does not have to meet a specific injury test in this case. However, it does have to weigh the relevant public interests in exercising its discretion to release or withhold the information.

Various Information Commissioners have recommended that an injury test be added to the exemption. In effect, this would make it the same as the exemption in Section 16(1)(c) for information the disclosure of which could harm law enforcement or the conduct of lawful investigations. We have not found any abuse in the application of the exemption in Section 16(1)(a). It should also be noted that the exemption ceases to apply after 20 years have passed.

All jurisdictions provide broad protection for law enforcement information, although they do so in different ways. The Task Force is of the view that the original public policy rationale for Section 16(1)(a) remains. Applying a specific, legislated injury test to investigations carried out by investigative bodies would demand considerable time and effort, without any additional information being released. In short, there are reasons to support the status quo, but no compelling reasons to change the exemption.

The section 16 schedule should be reviewed and renewed periodically to include new investigative bodies that are being created and delete those that are obsolete.

Security, Defence and Law Enforcement Community Consultation with Departments

The number of investigative bodies specified in the Regulations has not increased since 1984, except for the addition of the Canadian Security Intelligence Service when it was separated from the RCMP. The nine bodies included on the list include entire institutions such as the RCMP, and parts of institutions such as the Special Investigations Unit of the Department of National Defence. In recent years, other government organizations have become increasingly involved in criminal or quasi-criminal investigations. They are seeking investigative body status to facilitate information-sharing with bodies such as the RCMP (e.g. Citizenship and Immigration Canada's enforcement efforts against human trafficking).

We believe that criteria for identifying investigative bodies for the purposes of Section 16(1)(a) should be made transparent in the Regulations. These criteria could be included, for example, in a preamble to the Schedule of investigative bodies. The criteria should ensure that the exemption's scope continues to be limited. For example, any new investigative body should carry out investigations relating primarily to *Criminal Code* or indictable offences; should have its own statutory investigative powers (e.g. search and seizure); should be an identifiable unit of a government institution (the institution itself would only qualify where the mandate of its entire organization relates to investigation, such as the RCMP); and should clearly demonstrate why the injury-based law enforcement exemptions are inadequate to protect its interests.

4-13 The Task Force recommends that:

- **the exemption for information obtained or prepared in the course of a lawful investigation by an investigative body remain unchanged;**
- **the Regulations be amended to include criteria for investigative bodies; and**
- **the criteria focus on investigative work of a criminal or quasi-criminal nature.**

Section 16(1)(c) permits the head of a government institution to protect information the disclosure of which could reasonably be expected to harm the conduct of lawful investigations. Law enforcement agencies pointed out to us that disclosure of information might prejudice future, as well as current, investigations and that Section 16(1)(c) should be amended accordingly. We think this argument has some merit. However, we believe the exemption should only be extended with respect to foreseeable investigations.

4-14 The Task Force recommends that Section 16(1)(c) be amended to permit the head of a government institution to refuse to disclose information where disclosure could reasonably be expected to harm foreseeable, as well as current, investigations.

Section 20 – Information Provided by Third Parties about Critical Infrastructure Vulnerabilities

Among other things, Section 20 protects confidential commercial, financial, scientific or technical information that is supplied to the government by a third party and is consistently treated in a confidential manner by the third party. However, not all information supplied to government relates to a third party's financial or competitive position. Some third party information relates to the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect them. Such information has become even more sensitive in the light of the terrorist attacks that took place in the United States on September 11, 2001.

> [I]n light of the objective of protecting the security of the travelling public [ ] the GTAA must be able to avail itself of the same protections against the disclosure of sensitive security-related information that Transport Canada was entitled to when it operated Canada's airports.
>
> Greater Toronto Airports Authority
> Submission to the Task Force

We believe that it would provide an added measure of reassurance to third parties operating critical infrastructure, such as airports, if it were made explicit in the Act that the protections in Section 20 extend to such information. This would also make it clear that the related notice and appeal provisions apply, as well as the public interest override in Section 20(6). Other aspects of Section 20 are discussed further below.

4-15 The Task Force recommends that Section 20 of the Act be amended to clarify that information relating to critical infrastructure vulnerabilities, which third parties supply to the government, is covered by the section and the related notice and appeal provisions.

Other Exemptions/Exclusions

Section 14 – Federal-Provincial Affairs

Section 14 allows the head of a government institution to refuse to disclose information that could reasonably be expected to harm the conduct of federal-provincial affairs. The provision specifically includes information on federal-provincial consultations or deliberations, and on strategy or tactics relating to the conduct of federal-provincial affairs.

Section 14 accounted for 2.4% of exemptions claimed in 2000-2001.

There have been no serious challenges to Section 14. There have, however, been a few proposals over the years to change "federal-provincial affairs" to "federal-provincial negotiations" or "federal-provincial relations."

In our view, little would be gained by replacing the current wording with federal-provincial "negotiations" or "relations." "Negotiations" might well narrow the exemption unduly, as sensitivities can arise around Canada's federal-provincial relationships that do not involve negotiations. We see the word "relations" as close to interchangeable with the current wording.

Based on our review of the provision, we have concluded that Section 14 works as Parliament originally intended, and there are no compelling grounds for amending it.

Section 17 – Safety of Individuals

Section 17 accounted for 0.3% of exemptions claimed in 2000-2001.

Section 17 of the Act provides a discretionary, injury-based exemption for information, which if disclosed, could reasonably be expected to threaten the safety of individuals. The current Information Commissioner and his predecessor have both recommended that Section 17 be amended to extend protection to information that could reasonably be expected to threaten an individual's mental or physical health. We agree with this proposal.

Another individual's mental and physical health might be threatened if information were disclosed to an applicant which could reasonably be expected, if shown to the other person by the applicant, to cause the other person to become suicidal.

British Columbia
Freedom of Information and
Protection of Privacy
Policy and Procedures Manual

In our consultations with departments and agencies, the question was raised about how to protect records that are required to be kept, and which contain evidence of violent crimes (e.g. photographs of mutilated bodies), more than 20 years after the deaths of the victims. Until that time, this information is considered to be personal and is protected under Section 19. There is a strongly-held view that disclosure of such information could be traumatic for the victims' families and offensive to the public even after 20 years have passed. We agree that there are circumstances where the greater public interest would lie in protecting the information. However, it is our view that the *Access to Information Guidelines* should set out clear criteria for the application of the exemption to ensure that material of historical significance (e.g. war photographs) is not unduly withheld.

4-16 The Task Force recommends that Section 17 of the Act be amended to permit the head of a government institution to refuse to disclose information that could reasonably be expected to threaten the physical or mental health, as well as the safety of individuals, or where disclosure would offend human dignity.

Section 18 – Economic Interests of Canada

Section 18 accounted for 2.2% of exemptions claimed in 2000-2001.

Section 18 provides discretionary protection for information relating to the "economic interests of Canada." In fact, this covers various types of information:

- trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada;
- information which if disclosed, could reasonably be expected to prejudice the competitive position of a government institution;
- scientific or technical information obtained through research, which could if disclosed realistically be expected to deprive an officer or employee of priority of publication; or
- information the disclosure of which could reasonably be expected to materially injure the financial interests of the Government of Canada, or the government's ability to manage the economy.

Section 18(a) protects the government's financial, commercial, scientific or technical information that has or is likely to have substantial value. Some commentators have suggested that Section 18(a) be amended by limiting its protection to information having or likely to have "substantial *monetary* value." We agree with this change which would effectively codify the interpretation of "substantial value" as market value, as set out in the *Access to Information Guidelines*.

4-17 The Task Force recommends that Section 18(a) be amended to apply to financial, commercial, scientific or technical information that has, or is likely to have, substantial *monetary* value.

If the Task Force's recommendations regarding coverage under the Act are accepted, it will apply to certain Crown corporations and other alternative service delivery organizations for the first time. They will then be subject to Section 18 rather than Section 20, which protects commercial information provided to the government by third parties. Section 18(b) provides a discretionary exemption for information the disclosure of which could prejudice a government institution's competitive position. It is our view that this section should provide adequate protection for the competitive activities of most Crown corporations. However, as we discussed in Chapter 1, where this and other exemptions are inadequate to protect institutions' integral interests, exclusions should be considered for certain information (e.g. in relation to specific competitive commercial activities, which are separate and apart from an institution's public policy function).

Increasingly, the government's competitive, business-oriented activities are being carried out by special operating agencies associated with a government department or agency, or by some other form of alternative service delivery. However, the competitive business activities of these agencies may not be extensive enough to affect the competitive position of a government institution as a whole. The information related to those activities may therefore not qualify for protection under this exemption. This gap should be addressed.

4-18 The Task Force recommends that Section 18(b) be amended to extend protection to information, the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution, or *part of* a government institution.

One further issue regarding Section 18 relates to product or environmental testing. Section 20 of the Act, for example, expressly excludes from the scope of that exemption the results of product or environmental testing carried out by, or on behalf of, a government institution. The only exception is when the testing is done for a fee and as a service to a person or an outside organization.

The 1986 Parliamentary Committee recommended that Section 18 be amended to include a similar provision. It argued that without such an amendment, government institutions may not have to disclose their own product or environmental testing results, even though the results of testing carried out by, or on behalf of such institutions on private sector products or activities, are subject to disclosure. The Information Commissioner supports this amendment, as do we.

4-19 The Task Force recommends that Section 18 be amended to include a provision specifying that the exemption does not extend to the results of product and environmental testing.

Section 19 – Personal Information

The *Access to Information Act* and the *Privacy Act* were designed as complementary pieces of legislation. Generally speaking, the *Access to Information Act* governs the release of information of a non-personal nature, while personal information is dealt with under the *Privacy Act*.

The most frequently claimed exemption, Section 19 accounted for 28% of exemptions claimed in 2000-2001.

Section 19 of the *Access to Information Act* is the most frequently claimed exemption. It prevents the head of a government institution from disclosing a record containing personal information as defined in the *Privacy Act*, unless the person to whom it relates consents; the information is publicly available; or the disclosure is in accordance with Section 8 of the *Privacy Act*. In applying Section 19, therefore, the two Acts need to be interpreted together. One example of this interaction is that the identity of an individual who makes an access request is protected by the *Privacy Act*.

During our consultations, participants raised several privacy issues that are outside the Task Force's mandate.[6] These concerns will be considered in the ongoing review of privacy issues at the Department of Justice. Other concerns, however, focused on the interaction between the two statutes, and the often differing views held by the Information Commissioner and the Privacy Commissioner.

> It is obvious that both statutes [the *Access to Information Act* and the *Privacy Act*] are to be read together, since section 19 of the Access Act does incorporate by reference certain provisions of the *Privacy Act*.
>
> Mr. Justice La Forest
> *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403

A notable example of the interaction between the two statutes is the application of Section 8(2)(m) of the *Privacy Act*. This provides for the disclosure of personal information when it is in the public interest. An institution is required to notify the Privacy Commissioner before making such a disclosure, where this can reasonably be done. A situation can arise where the Information Commissioner advises the institution to disclose personal information in the public interest, but the Privacy Commissioner advises the institution to protect the information on the grounds that the public interest in the case does not clearly outweigh the invasion of privacy that could result from disclosure. This puts the institution in the difficult position of having conflicting recommendations from the two Commissioners.

It is the head of the government institution who must ultimately decide whether or not to disclose the information. That decision may be challenged and the question referred to the courts for further review. Nevertheless, it is our view that most privacy issues can be resolved between the two Commissioners.

4-20 The Task Force encourages the Information Commissioner to consult with the Privacy Commissioner as early in the process as possible when issues arise relating to the release of personal information.

Section 20 – Third Party Information

Section 20 is intended to protect confidential commercial information which third parties provide to the government. It parallels Section 18, which protects the government's own information of a commercial nature.

The second most frequently claimed exemption, Section 20 accounted for 23.9% of exemptions claimed in 2000-2001.

This is a mandatory exemption, requiring the head of a government institution to refuse to disclose any record containing:

- trade secrets;
- confidential commercial, financial, scientific or technical information that a third party supplies to the government, and consistently treats in a confidential manner;
- information, which if disclosed, could reasonably be expected to result in a material financial loss or gain to, or prejudice the competitive position of, a third party; or
- information, which if disclosed, could reasonably be expected to interfere with the contractual or other negotiations of a third party.

> [T]he third party provisions of the Act provide a good framework that balances the public interest in disclosure of government information with the public and private interest in ensuring that valuable commercial information is protected.
>
> Murray Rankin, Kathryn Chapman
> Research Report 19

The comparatively high rate of litigation does not necessarily reflect problems with the *Act*. Rather, [it] may underscore the fact that corporations are generally most impacted by these provisions and are often better placed than individuals to challenge application of these provisions. As well, [it] may be reflective of the need for education with respect to the principles that inform the *Act*.

Murray Rankin, Kathryn Chapman
Research Report 19

There are three qualifications to the exemption:

- the head of a government institution cannot refuse to disclose the results of product or environmental testing carried out by, or on behalf of a government institution, unless it was done for a third party and for a fee;
- information may be disclosed, provided the third party to which it relates consents; and
- as noted earlier in our report, the head of a government institution may disclose a record subject to the exemption (other than a trade secret), if disclosure would be in the public interest as it relates to public health, public safety, or protection of the environment, and if the public interest in disclosure clearly outweighs in importance the interests protected by the exemption.

The provision must be viewed together with Sections 27, 28, 29 and 44 of the Act, which describe the notice and appeal rights of third parties.

Section 20 is one of the most frequently claimed exemptions, second only to the exemption for personal information (Section 19). The Information Commissioner is concerned that the exemption is abused and over-litigated – presumably because of a widespread reluctance on the part of third parties to have information of a commercial nature disclosed. However, the higher rate of litigation is also due to the high degree of interaction between the government and third party business interests, and the large number of access to information requests from business (40 per cent of total requests).

We believe that the provision is basically sound, and that the courts have consistently applied it as originally intended by Parliament. This is one of the few areas of the Act where there is a substantial body of case law. Therefore, changes being recommended are essentially to clarify the current exemptions and the public interest override, and to reform the administrative practices relating to third party information.

Rather than providing clarification, [a definition of "trade secrets"] might create uncertainty. In addition, freezing the definition of "trade secrets" may be inappropriate because its meaning will evolve over time.

Murray Rankin, Kathryn Chapman
Research Report 19

The 1986 Parliamentary Committee recommended that the Act be amended to include a "narrow" definition of trade secrets. In its view, this would help distinguish them from other confidential commercial information protected by the exemption. However, the courts have in fact applied a very narrow definition of trade secrets in the context of access to information. It is our view that the addition of a definition to the Act is therefore unnecessary. In fact, legislating a definition could create uncertainty in an area where the case law is clear.

Except for trade secrets, the head of a government institution may disclose information protected by Section 20(1) "if that disclosure would be in the public interest as it relates to public health, public safety, or protection of the environment and if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party."

✓

Informing third paries about the Act, and the portions of their information that would be disclosed in response to a request, before they provide that information.

The Information Commissioner has recommended that the override in Section 20(6) be broadened to include consumer protection as an element of the public interest to be considered (along with public health, public safety and protection of the environment) in deciding whether to disclose the information in question. We agree with this recommendation.

4-21 The Task Force recommends that Section 20(6) be amended to add consumer protection as a public interest element for the head of a government institution to weigh in deciding whether to disclose information subject to this provision.

Under Sections 27-29 and 44 of the Act, third parties have the right to be notified if the head of an institution intends to disclose a record protected by Section 20, as well as a right to make representations and to appeal to the Federal Court.

The 1986 Parliamentary Committee observed that notification of third parties within the 30-day time limit could be difficult, particularly where many third parties had to be notified or they were located outside of Canada. With this in mind, the Committee recommended that the Act be amended to provide, in such circumstances, for notifying third parties through the *Canada Gazette* and advertisements in relevant trade journals, periodicals or newspapers. Information Commissioners have agreed with this recommendation. This amendment is overdue.

4-22 The Task Force recommends that the notification and appeal provisions of the Act be amended to provide for alternate forms of notice to third parties, such as publication in relevant trade journals.

After reviewing all issues related to Section 20, we concluded that the education of third parties about the Act is key to any improvement. It was clear from our consultations that many third party complaints arise from the fact that third parties are unaware that information they provide to government may be accessible under the Act. For this reason, departments that deal extensively with third parties on access to information have taken steps (such as preparing fact sheets) to make sure that third parties understand what information may be accessible, and why. Such best practices should be shared and adopted throughout the public service.

[I]t may be more appropriate to focus on informing and educating corporations doing business with government as to their roles and responsibilities within the regime of open and accountable governance contemplated in the Act.

Murray Rankin, Kathryn Chapman
Research Report 19

4-23 The Task Force recommends that:

- **government institutions be encouraged to take steps to increase third party awareness of access to information; and**
- **the *Access to Information Guidelines* be updated to reflect the wealth of case law on Section 20, to assist public servants in its application, and to help educate third parties about the exemptions in Section 20.**

Section 22 – Testing Procedures, Tests and Audits

Section 22 accounted for 0.2% of exemptions claimed in 2000-2001.

Section 22 gives the head of a government institution discretion to refuse to disclose information relating to testing or audit procedures or techniques, or details of specific tests to be given or audits to be conducted, if disclosure would prejudice the use of results of particular tests or audits. The section does not provide an exemption for the results of tests or audits.

The government's *Policy on Internal Audit* requires departments to issue completed internal audit reports "in a timely manner and make them accessible to the public with minimal formality." As a result, government institutions make final audit reports publicly available as a matter of course. However, a question has arisen about the release of draft internal audit reports and related working papers, which may contain unvalidated information.

The internal audit community, as well as the Auditor General of Canada, have expressed concerns about the impact of any premature release of draft internal audit reports and working papers before the information is validated. It is their view that the potential release of incomplete reports or unvalidated information could result in internal audit reports that are limited in scope or content. This would affect the ability of internal auditors to meet professional standards and would in turn affect the extent to which the Office of the Auditor General might rely on the work of internal auditors.

More specifically, the Auditor General has expressed the view that internal audit records should be protected for a period of time that is sufficient to allow internal auditors to effectively carry out their function, that is, to complete their work and validate the results. We agree internal audit working papers and draft reports should be protected, not indefinitely, but until the internal audit report is completed. To avoid any possible abuse of such a provision by keeping reports in draft form indefinitely, draft internal audit reports should be accessible six months after the audit has been completed or work on the audit has stopped. In no case should they be protected for longer than two years after the audit begins.

4-24 The Task Force recommends that Section 22 of the Act be amended to give the head of a government institution discretion to refuse to disclose draft internal audit reports and related audit working papers until the earliest of:

- **the date the report is completed;**
- **six months after work on the audit has ceased; or**
- **two years following commencement of the internal audit.**

Section 23 – Solicitor-Client Privilege

Section 23 permits the head of a government institution to refuse to disclose records containing information subject to solicitor-client privilege. The doctrine of solicitor-client privilege has been recognized as a fundamental principle of our legal system for over 300 years. The exemption in Section 23 ensures that the government has the same protection for its legal documents as persons in the private sector. The exemption was made discretionary to parallel the common law rule that the privilege belongs to the client who is free to waive it.

Section 23 accounted for 4.3% of exemptions claimed in 2000-2001.

The Task Force examined previous proposals and related approaches in other jurisdictions. We concluded that Section 23 should remain a discretionary class exemption. However, we believe that the privilege in the context of the Act may not always be well-understood by government lawyers and government institutions, and that guidance should be provided on the circumstances in which a record could be disclosed without prejudice to the government's legal interests. This could be done through training and guidelines.

> [T]his exemption should continue as a class exemption. Again, perceived abuse or over-use of the exemption should be addressed as part of the process of clarifying and explaining the use of discretionary exemptions.
>
> Barbara McIsaac
> Research Report 17

4-25 The Task Force recommends that

- **training be provided to government lawyers and government institutions on the application of the Act to records subject to solicitor-client privilege; and**
- **the *Access to Information Guidelines* be amended to describe the nature and scope of solicitor-client privilege in greater detail, and the steps to be taken in determining whether all or part of a record should be released under Section 23.**

Section 25 of the Act requires the head of a government institution to sever and release parts of a record that are not protected. Under the common law, however, disclosure of part of a record subject to solicitor-client privilege can constitute a waiver of the privilege with respect to the rest of the record, or other related records. This is understandably of concern to the legal community.

We agree with the Information Commissioner that it would be useful to spell out in the Act that release of part of a record containing privileged information does not result in waiver of the privilege on information in the rest of the record, or in related records.

4-26 The Task Force recommends that the Government consider amending Section 23 of the Act to provide that severance of a record subject to solicitor-client privilege does not result in waiver of the privilege with respect to the rest of the record, or other related records also subject to the privilege.

Section 24 – Statutory Prohibitions

Section 24 accounted for 1.3% of exemptions claimed in 2000-2001.

Section 24 of the Act prohibits release of any record containing information "the disclosure of which is restricted by or pursuant to any provision set out in Schedule II." For example, the Schedule includes confidentiality provisions from the *Income Tax Act*, the *Criminal Records Act* and the *Old Age Security Act*. A number of these provisions make it an offence for a public servant to disclose the protected information, or allow disclosure only for specified purposes.

Even those concerned that section 24 detracts from the purposes of the Act do agree that special measures to ensure confidentiality are necessary in certain cases.

Murray Rankin & Associates
Research Report 16

Schedule II currently lists 66 such provisions in 52 federal statutes. There were 40 provisions in 33 statutes when the Act came into force in 1983. Some believe that Section 24 and Schedule II are necessary to protect valid confidentiality regimes, while others believe that this type of provision detracts from the principles and goals of open and accountable governance that underlie access to information regimes.

The 1986 Parliamentary Committee recommended that Section 24 and Schedule II be repealed and replaced with new mandatory exemptions to protect information where there is a need to ensure absolute confidentiality (e.g. income tax information).

As a general rule, we believe that protections against the disclosure of government information should be found in the *Access to Information Act*. In our view, the exemptions set out in the Act, as modified by our recommendations, should provide sufficient protection against disclosure in most cases. However, at times the government must be in a position to give a very firm assurance that information will not be disclosed. The usual examples of information requiring such a high degree of protection are income tax information and census data.

We concluded that an exemption for statutory prohibitions remains necessary. However, we also concluded that the standard to be met for such protection should be high.

4-27 The Task Force recommends that the exemption for statutory prohibitions in Section 24 be retained.

To preserve the integrity of the access to information regime, the list of exempted provisions in Schedule II should be as short as possible. We believe that it should include only those provisions that either prohibit disclosure entirely, or set out a clear and restricted framework for disclosure. It makes no sense to prohibit the release of information under the Act where there is broad discretion to release that information under another statute. The equivalent exemption in the United States sets out specific requirements. These are that the confidentiality regime in the other statute must provide that information is to be withheld from the public, or establish particular criteria for withholding the information or refer to particular types of matters to be withheld. We agree with such a test.

We concluded that the criteria for including statutory prohibitions on Schedule II of the Act should be set out in the Act. They should be accompanied by a provision allowing the Governor-in-Council to add a confidentiality provision from another statute to the Schedule only if it meets these criteria. This would ensure transparency of the factors to be considered in determining whether a provision should be added to the Schedule.

4-28 The Task Force recommends that:

- **the Act be amended to specify criteria for confidentiality provisions from other statutes included on Schedule II;**
- **the Act be amended to include a provision allowing the Governor-in-Council to add confidentiality provisions to Schedule II only if they meet the criteria;**
- **the criteria ensure that the Schedule include only confidentiality provisions that offer a very firm assurance that information will be protected, as evidenced by a prohibition against disclosure, or clearly-defined limits on any discretion to disclose; and**
- **the *Access to Information Guidelines* provide further details about the criteria and approval process for additions to the Schedule, and require the applicant institution to demonstrate why the other exemptions in the Act are not sufficient to protect the information in question.**

It is also our view that Schedule II should provide a single comprehensive list of all statutory provisions that prevail over the Act. However, there are sections in other federal statutes that apply "notwithstanding" the Act. Those provisions are not included in the list on Schedule II.[7]

4-29 The Task Force recommends that all statutory provisions that prevail over the *Access to Information Act* be listed in Schedule II to the Act.

The list of legislative provisions on Schedule II has grown significantly since the Act came into force in 1983. The Task Force's preliminary review of the list shows that many of the current provisions do not meet the test proposed above. This is because they allow discretion to disclose, with no criteria or other parameters for the exercise of that discretion. The government should undertake a comprehensive review of Schedule II to identify and remove those provisions that do not meet the criteria. To facilitate this, the Governor-in-Council should be authorized to remove them from the Schedule. Deletion currently requires an Act of Parliament.

4-30 The Task Force recommends that:

- **the existing list in Schedule II be examined to substantially reduce the number of provisions, by assessing them against the criteria proposed for inclusion in the Act; and**
- **the Act be amended to allow the Governor-in-Council to delete provisions listed on Schedule II.**

> Clearly some mechanism is required to ensure that the disclosure requirements of the *Access to Information Act* do not undermine legitimate confidentiality requirements in other legislation. Section 24 is as good a mechanism as any. [Schedule II] should, however, be reviewed on a yearly basis to ensure its continuing consistency and relevance.
>
> Barbara McIsaac
> Research Report 17

We are in favour of a periodic review of Schedule II, and detailed annual reporting by institutions on which provisions from the Schedule they invoked in the application of the Section 24 exemption. This oversight would ensure that the list of provisions in the Schedule is kept to a minimum.

4-31 The Task Force recommends that:

- **government institutions continue to report annually on the number of occasions on which they refused to disclose information on the basis of Section 24, and the Schedule II provisions relied upon; and**
- **Schedule II be reviewed periodically by a parliamentary committee.**

Section 26 – Refusal of Access Where Information is About to be Published

Section 26 accounted for 0.3% of exemptions claimed in 2000-2001.

Section 26 provides that the head of a government institution may refuse to disclose a record if he or she has reasonable grounds to believe that it will be published within 90 days, or within "such further period of time as may be necessary for printing and translating the material for the purpose of printing it."

Traditionally, "published" meant printed material. However, in our increasingly electronic world, the Internet in particular has revolutionized the communication of information, and this definition of "published" is now obsolete.

Some requesters believe that government institutions are using the exemption in Section 26 to justify delaying the release of information beyond what may be necessary. There is also a perception that the publishing process is much faster in this age of electronic printing or posting on a Web site, and therefore the period for disclosure should be reduced from 90 to 60 days. Experts we consulted told us that there is no significant difference between the time required for printing material, and the time required for posting it on a Web site. Posting information also involves editing, layout and translation.

We do not recommend any change to the 90-day period. However, we believe that any extension beyond the 90-day period should be restricted to what is reasonable. We also believe that invoking a number of best practices and elaborating on them in the *Access to Information Guidelines* would minimize any delays. These could include the release of material if it is not actually in translation or being formatted for publishing at the end of the 90-day period. Also, when Section 26 is invoked, the requester should be informed of the material's likely publication date, and given a status report at the end of 90 days, if the material is not released at that time.

The exemption can only be claimed where the head of the institution believes on "reasonable grounds" that the record requested will be published. The *Access to Information Guidelines* state that "reasonable grounds" would normally be a statutory requirement to publish or a publication plan with target dates that was prepared before receipt of the request. Unless there is a high degree of certainty about publication, therefore, the exemption in Section 26 should not be claimed. This should be emphasized in Access to Information training.

Finally, we believe the language of Section 26 should be modernized. As it now stands, a delay beyond 90 days can be triggered by a need for more time for "printing or translating the material for the purpose of printing it." In our view, the section should be amended to reflect the fact that much government information is now published in electronic, rather than print form.

4-32 The Task Force recommends that:

- **the Act be amended so that Section 26 provides that the head of a government institution may refuse to disclose information if it is to be published within 90 days or within "such further period of time as may *reasonably* be necessary for preparing the material for *publication*, including translating it for the purpose of *publication*;"**
- **the *Access to Information Guidelines* set out best practices in relation to the application of Section 26 (e.g. release the material if it is not actually in translation or being formatted for publishing at the end of the 90-day period); and**
- **Access to Information training emphasize that Section 26 should be claimed only where there is a high degree of certainty that material in the record requested will be published.**

Section 68 – Exclusion of Published Materials

Section 68 states that the Act does not apply to published material or material available for purchase by the public. The underlying principle of this exclusion is that published materials are already available without recourse to the Act. In Chapter 8, we encourage proactive disclosure of government information. Increasingly, this will be done through the Internet. We are therefore pleased to note that the Information Commissioner recently agreed that information posted on a government Web site may be considered "published" for purposes of the Act.

The Task Force is of the view that no change is required to Section 68. However, institutions relying on the exclusion should, as a matter of practice, help requesters find printed materials or materials published on government Web sites. Reasonable assistance should include providing a printed version of material posted on a government Web site if the requester does not have access to a computer, or providing a copy of an out-of-print government publication that is not available at the requester's local libraries.

4-33 The Task Force recommends that:

- **the exclusion for published materials in Section 68 remain the same; and**
- **the *Access to Information Guidelines* be amended to make it clear that government institutions should provide reasonable assistance to requesters in locating materials published by the government.**

Protecting Cultural and Natural Heritage Sites

The Task Force was hesitant to propose any additions to the 13 exemptions already set out in the Act. However, based on the approach in several provincial jurisdictions, we have concluded that a single exemption should be added to protect information where disclosure could damage or interfere with the preservation, protection or conservation of cultural and natural heritage sites, or other sites that have an anthropological or heritage value. The exemption would also support United Nations conventions that Canada has accepted such as *The Convention Concerning the Protection of the World Cultural and Natural Heritage.*

The protected sites exemption should also include confidential information about a place of spiritual or other cultural value to an aboriginal people. British Columbia's protected sites exemption includes sites that have an "anthropological or heritage value," defined in the Regulations to include sites of value to an aboriginal people. In its 1998 *Archives Act* Review[8], the Australian Law Reform Commission proposed a broad exemption category to protect confidential indigenous information. Similarly, a proposed *Information Act* for Australia's Northern Territory includes exemptions for information about an aboriginal sacred site or aboriginal tradition.

4-34 The Task Force recommends that the Act be amended to include a discretionary exemption for records containing information the disclosure of which could damage or interfere with the preservation, protection or conservation of cultural and natural heritage sites, other sites that have an anthropological or heritage value, or sacred sites of aboriginal peoples.

Conclusion

The Task Force is of the view that the protections currently provided in the Act for government-held information are appropriate. We have, however, recommended changes to modernize certain provisions. The most notable example is our recommendation to convert the exclusion for Cabinet confidences to an exemption.

It is our view that the changes proposed, including those proposed to guidelines and practices, reflect a good balance between the public interest in the availability of government information, and the public interest in protecting certain information from disclosure. Moreover, we believe they reflect the best possible balance for the future.

---

[1] Barbara McIsaac, *The Nature and Structure of Exempting Provisions and the Use of the Concept of a Public Interest Override*, Research Report 17.

[2] Questions such as these have become part of the practice of jurisdictions like New Zealand, with good results.

[3] Australian Law Reform Commission Report 77, "Open government: a review of the federal *Freedom of Information Act 1982*," Commonwealth of Australia 1995, paragraph 9.8. http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html

[4] The guidelines followed by the House of Commons in determining if government papers or documents should be exempted from production differentiate between consultant studies comparable to the kind of investigation of public policy for which the alternative would be a Royal Commission and which should be produced, and consultant studies "comparable to work that would be done within the Public Service which should be treated as such when consideration is being given to their release." See Journals, March 15, 1973, p.187.

[5] There are provisions for certificates to protect national security information in the legislation of most foreign jurisdictions studied by the Task Force. See Section 33, Australia's *Freedom of Information Act*, Sections 24 and 25, Ireland's *Freedom of Information Act*, Section 31 of New Zealand's *Official Information Act*, and Sections 23 and 24 of the United Kingdom's not-yet-in-force *Freedom of Information Act*.

[6] For example, the Task Force received a number of submissions on disclosure of historical census data.

[7] For example, sections 20(3) and 22(3) of the *Hazardous Products Act* apply "notwithstanding the *Access to Information Act*."

[8] Australian Law Reform Commission Report 85, "Australia's Federal Record: A Review of the *Archives Act 1983*, Commonwealth of Australia 1998, paragraphs 20.65 to 20.73. http://www.austlii.edu.au/au/other/alrc/publications/reports/85/ch20.html#Heading14

Chapter 5 – The Access Process in the Act

Sections 6 to 12 of the *Access to Information Act* set the framework that institutions must adhere to in processing requests. These sections endeavour to strike a balance between the needs of requesters and the capacity of institutions to comply while delivering on their mandate. They regulate the time limits for responding to requests, the framework for fees, and the requirements for notices to the requester.

Requests

Format of Release

Government institutions may hold the same records in a variety of formats (e.g. paper, electronic, microfilm). The Act and the Regulations do not specify who makes the decision as to which format of a record to provide to the requester; so the decision rests with the institution. We believe that requesters should be able to choose the format for the copy they receive, if the record can be disclosed, and already exists in that format. This is subject to conditions described in the Regulations (which deal with circumstances where copies of records cannot be provided; for example, if the record is in a form which cannot be copied without damaging it).

5-1 The Task Force recommends that the *Access to Information Regulations* be amended to provide that a requester may indicate a preferred format, and that where information can be disclosed and already exists in that format, it should be provided.

Clarifying and Determining the Scope of Requests

Requesters sometimes require assistance in expressing their requests in terms that the government institution can understand. It is therefore often up to the access to information office to help requesters find the terms to describe the records they are seeking. Some requesters contact institutions beforehand to discuss how to phrase their requests. Many institutions contact requesters to discuss the scope of their requests as a matter of course. They find this helps to focus on what the requester really wants, and to reduce response times. Requesters have consistently identified this as a very helpful practice.

> There is usually a story behind a request and knowing the story makes the search and review for relevant information much simpler and more focused. It can often lead to the request being treated informally simply by providing an answer to the question the person wanted to ask.
>
> Submission to the Task Force

While recognizing that the final decision on the request's scope always rests with the requester, we believe that, as a best practice, Access to Information Coordinators and their staff should be encouraged to contact requesters to discuss their requests in almost every case. The exception would be the rare cases where the scope of the request is perfectly clear, and cannot be misinterpreted. In many cases, it is useful to have the requester speak directly to someone in the program area, who can explain what information they have, how it is organized, and what is already available informally. We also believe that access officers should keep in touch with requesters to provide updates on the processing of their requests. For example, if it appears that a lot of time will be needed to locate very few disclosable records, the officer should let the requester know as soon as possible. Requesters should then have the opportunity to amend their requests in order to reduce the fees they could be required to pay, or the length of time that will be needed to process the request.

[A] simple phone call from the access officer to the requester to clarify exactly what it is that is requested could save a lot of bureaucracy.

Report on Consultations
to Review the Access to
Information Act and its
Implementation

✓

Offer to put the requester in direct contact with the program staff, especially where the subject matter is technical.

5-2 The Task Force recommends that the *Access to Information Guidelines* be amended to encourage Access Coordinators to contact requesters upon receipt of a request, in order to confirm or clarify it, and to ensure that the request is focused on the information the requester really wants.

Nothing will corrode respect for the law among public servants more quickly than the sense that there is no protection against the abuse of FOI rights.

Alasdair Roberts
Notes for Address to Media
Association of Jamaica
Seminar, February 2000

Given that government institutions have limited human and financial resources, legislation in all of the jurisdictions we examined has provisions for balancing the demand for access to information and the capacity of institutions to respond. These provisions can include fee structures, time limit extensions, requirements for defining the subject of a request, and authority to refuse to process requests based on their nature or size. The *Access to Information Act* contains fewer administrative limits than most other similar legislation.

Defining a Request

Institutions sometimes receive broad, unfocused requests involving large numbers of records. For example, there have been requests for "every record located in the office of Ms. X" and "every e-mail message in the inbox of Mr. Y." Such requests, which are not precise as to the information of interest to the requester, by their nature require the processing of a large proportion of records which, in the end, may not be of interest. We believe that these requests are not in keeping with the Act's intent, or with the effective use of taxpayers' money. To prevent this problem, the Act should be amended to clarify that requests must be reasonably specific; they must refer to a specific subject matter, or to specific records. However this is done, the amendment must also ensure that this requirement does not impede legitimate requests.

5-3 The Task Force recommends that the Act be amended to clarify that requests must refer to a specific subject matter, or to specific records.

Frivolous, Vexatious or Abusive Requests

After discussing this issue extensively with Coordinators and requesters, we have concluded that in Canada, as in the other jurisdictions we examined, there exist requests that are frivolous, vexatious or abusive, but that the number of such requests is very small. Nonetheless, these requests tend to have a negative impact on the reputation of access within the public service. As well, processing them represents a waste of resources that could be better spent responding to legitimate requests. Several of the jurisdictions that we examined, including Alberta, Ontario, British Columbia, Ireland, New Zealand and the United Kingdom, authorize government institutions to refuse to process requests that are abusive, frivolous and/or vexatious.[1]

> Vexatious applications can take many forms, but are most often made by applicants with a fixation on a particular matter or a particular agency that they are unwilling or unable to put aside. In either case, there is a limit to the resources that agencies and my office can reasonably devote to dealing with such applications.
>
> Information Commissioner, Western Australia, Annual Report 1999-2000

We have found that in other jurisdictions which have such provisions, the courts have set the test for applying them very high. In his 2000-2001 Annual Report, the Information Commissioner recommended that government institutions be given the power to refuse to respond to frivolous or vexatious requests. His recommendation included a right to complain to the Commissioner, who could issue a binding recommendation. In Alberta and B.C., institutions may seek the authorization of the Commissioner to refuse to process a frivolous or vexatious request. Since refusal to process a request is a drastic measure, we believe that this would be an appropriate approach. This mechanism would give the needed assurance that the provision would not be used inappropriately.

5-4 The Task Force recommends that:

- **the Act be amended to authorize institutions, with the agreement of the Information Commissioner, to refuse to process requests that are frivolous, vexatious or abusive; and**
- **the Treasury Board Secretariat, in consultation with the Information Commissioner, issue detailed guidelines to government institutions providing the criteria for identifying a frivolous, vexatious or abusive request.**

Time Limits

Section 7 of the Act requires that, within 30 days of receiving a request, a government institution inform the requester whether access to the requested record is to be given and, if so, to provide it. Section 9 allows the 30-day period to be extended "for a reasonable period of time" in three situations:

- the request is for a large number of records, or requires a search through a large number of records, and meeting the original time limit would unreasonably interfere with the operations of the government institution;

> An optimal set of administrative deadlines would combine sufficient pressure to meet the reasonable needs of applicants with the realistic possibility of consistent compliance without an undue increase in administrative staff and cost.
>
> Green Paper, 1977

- consultations are required which cannot be completed within the original time limit; or
- notice is being given to third parties.

The Commissioner must be notified of any extension of more than 30 days. If a record is not provided within the legislated time limits (i.e. the original 30 days or the extended period) the request is deemed under the Act to have been refused.

Not responding within statutory time limits has been a serious problem in Canada, as in many other jurisdictions. At the federal level in this country, delays have accounted for a very large share of complaints to the Information Commissioner (49 per cent in 1999-2000; 42 per cent in 2000-2001, 28.8 per cent in 2001-2002).

Requesters waiting for information believe that the time limits are too long. Officials responding to requests believe that the current time limits do not reflect the reality of complex requests, the need for multiple consultations and third party notices, and heavy workloads.

Thirty-Day Time Limit[2]

Access Coordinators and the Information Commissioner have agreed that requests have become more complex, often requiring broader searches and more consultation.

After examining the time limits in other jurisdictions, we believe that the current 30-day period is about right.

Given the inevitable, competing priorities within government departments, the expectation of compliance within thirty calendar days appears to be a practical choice, especially when the records requested are in the hands of program managers and have to be located, retrieved, copied, reviewed, and consulted upon. These are not minor activities in most instances.

David Flaherty
Research Report 25

The suggestion has been made, however, that the 30-day limit should be expressed in terms of working, rather than calendar days. As Access Coordinators have pointed out, expressing the time limit in calendar days means that the amount of time available to an institution for processing a request depends on when it is made (with December being the worst-case scenario). We have noted that the limits in both New Zealand and the United States are expressed in terms of working days. We agree that it makes more sense to express the time limit in working days.

The question then becomes, how many working days should be allowed? We are reluctant to either reduce or increase the time available to process requests, which leaves a limit of 21 working days – the average equivalent of 30 calendar days. This would ensure that institutions have exactly the same amount of time for processing every request.

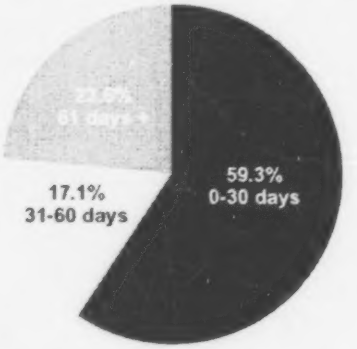
The other time limits for processing requests – for transferring a request, the extension of time limits, the time period for exemption of information that is about to be published, the time limits for notifying a third party and for the third party to make representations to the institution – should also be adjusted to reflect equivalent working days.

5-5 The Task Force recommends that Section 7 of the Act (which gives the time limit for notifying the requester) be amended to substitute "twenty-one working days" for "thirty days", and that all of the time limits for processing requests also be adjusted to reflect working days.

Extensions

As noted above, the Act currently permits a government institution to extend a response beyond 30 days. While there is no statutory limit on the extension, it must be "for a reasonable period, having regard to the circumstances". The Information Commissioner must be notified if the extension is for more than 30 days.

Time to complete requests (2000–2001)



The Act provides that the time limit for responding can be extended if the number of records is large *and* meeting the time-frame would interfere with the operations of the institution. Experience has shown that there are reasons other than size that can make the processing of a request within 30 days interfere with the operations of the institution. For example, processing may require input by specialists, of whom there are very few, or officers in the program area responsible for the relevant records may currently be involved in a crisis. The Information Commissioner has expressed the view that the permissible grounds for an extension should be adjusted to reflect these types of circumstances.

After discussion with the Office of the Information Commissioner, we believe that it would greatly simplify the administration of the extension provision if the permissible reason for extension contained in Paragraph 9(1)(a) was simply stated as unreasonable interference with the operations of the institution.

Whatever the motive behind a request, FOI should never be allowed to divert an agency from its primary functions. This is essential not simply for good government, but also for the good name of FOI.

Robert Hazell, *Freedom of Information in Australia, Canada and New Zealand: Reports to the Cabinet Office*, September 1987

5-6 The Task Force recommends that Paragraph 9(1)(a) of the Act be amended to permit an extension of the time for responding to a request if "meeting the original time limit would unreasonably interfere with the operations of the government institution".

Release of Processed Records

Some government institutions are not releasing any information to a requester before the deadline for responding, or until the full request is completely processed. Others are releasing batches of information to a requester as it is processed. We believe this is the better course. If the requester wishes to receive some information as soon as it is ready for release, there is usually no reason why it should not be provided.

✓

Releasing records to the requester as they become available

5-7 The Task Force recommends that Access to Information Coordinators be encouraged to offer to release information to requesters as soon as it is processed, without waiting for the deadline, or for all of the records to be processed.

When Time Limits Are Not Met

The Task Force recognizes that the problem of not consistently meeting the legislated time limits is serious. Several proposals have been made for methods of dealing with delays, including the suggestion that institutions should lose the right to claim some or all exemptions when their response to a request is late. We do not agree that a government institution should be precluded from relying on the exemptions authorized by Parliament if a response is not provided within the statutory time limit. This is not because we condone delays; to the contrary. However, as explained in Chapter 4, exemptions are included in the Act to allow information to be withheld where it is in the public interest to do so. For this reason, preventing institutions from invoking exemptions would be likely to harm the public interest, rather than discipline the government institution.

Another suggestion has been made to remove the right of institutions to charge fees if the response to a request is late. We believe that this mechanism would not provide the right incentive to institutions to process requests in the shortest time, or to requesters to focus their requests. Later in this chapter, we will recommend that timeliness be considered as an important factor in determining whether an institution should waive fees.

Nevertheless, we believe that there are several related administrative steps that institutions can and should take to reduce the number of late responses to requests. More specifically, if an institution concludes that it will be unable to respond within the legislated time-frames, the *Access to Information Policy* should require that:

- the institution inform the requester in writing that the response will be late, the reason for the delay, when to expect a response, and that they can complain to the Information Commissioner;
- the institution provide the Information Commissioner with a copy of the letter, so that he can monitor the frequency with which institutions are late in responding;
- Access Coordinators report on a regular basis to their Deputy Minister, or equivalent, on the number of occasions on which the time limits were not met, and the reasons for the delays, in order to allow senior officials to monitor and address the issue in their institution; and
- this information be included in the annual access to information reports of each institution so that Parliamentarians are given a better understanding of how well the government is meeting the timeframes set out in the Act.

5-8 The Task Force recommends that the *Access to Information Policy* require that:

- **where a government institution concludes that it will be unable to respond within the legislated time-frames, the institution inform the requester in writing that its response will be late, explaining the reason for the delay, the expected date of response, and that the requester can complain to the Information Commissioner;**
- **institutions provide the Information Commissioner with a copy of the letter;**
- **Access Coordinators report on a regular basis to their Deputy Minister, or equivalent, on the number of occasions on which the time limits were not met and the reasons for the delays; and**
- **government institutions report this information in their annual access to information reports to Parliament.**

Fees

For 2000-2001, the average cost per request was $1,035; the average fee collected per request was $12.47; the average fee waived was $7.45.

Section 11 of the Act provides for an applicant to be charged an application fee, not to exceed $25, and also to be charged for:

- reasonable search and preparation time in excess of five hours;
- the costs of producing a record in an alternative format;
- the production of a machine-readable record; and
- reproduction costs

with specific amounts set by regulation. Heads of institutions have the authority to require applicants to pay deposits, or to waive or repay a fee.

The actual fees and charges in the Regulations have been virtually unchanged since 1983. They include an application fee of $5 and specific amounts for reproduction in various media (e.g. 20 cents per page of photocopying); producing records in alternative formats for disabled requesters (e.g. $2 per diskette); search and preparation time ($2.50 for every 15 minutes in excess of five hours); and producing from a machine-readable record (e.g. $5 for every 15 minutes of processing time). The same fee schedule is applied to any request; no distinction is made based on the purpose of the request, the size of the request, or the type of information sought.

> [T]he existing fee structure, with its generous provisions for fee waivers, open-ended complaint provisions and imprecise extension, results in an adversarial and frustrating situation for both departments and applicants.
>
> Elizabeth Denham
> Research Report 23

This fee schedule is one of the lowest in Canada (see the comparison chart of fees in Annex 2). A study of federal access to information requests in 1998-99[1] found that applicants paid a total of $290,000, of which 23 per cent was application fees and 76 per cent was processing charges and reproduction. As the total direct cost of handling requests in that year was estimated to be $16.2 million, revenues represented only 1.8 per cent of direct costs.

The views on fees are so polarized, they are probably irreconcilable. Requesters believe they should be charged as little as possible, while institutions believe that the current fee structure is out of date and is not providing the right balance.[4]

Internationally, there is no standard for fees. Each jurisdiction has developed a recipe of the activities for which charges are levied; the rates, the amount of the application fee, if any; the criteria for waiving fees; and whether any distinction will be made according to categories of requesters. Levels of fees also vary considerably across jurisdictions, and sometimes among institutions within a jurisdiction, but rarely approach any level of significant cost recovery, except in special circumstances.

> [A]pplicants should make some contribution to the cost of providing government-held information but that contribution should not be so high that it deters people from seeking information.
>
> Australian Law
> Reform Commission
> Report 77

While the *Access to Information Act* provides that government information should be available to the public, with specific and limited exceptions, it was never intended that there would be no charge for such information. It must be recognized, however, that a strict application of the user-pay principle would almost certainly mean that the Act would fail in its objectives. On the other hand, totally free access would put an unreasonable financial and administrative burden on institutions.

In the view of the Task Force, the fee structure should:

- be compatible with the objective of providing access to information to Canadians;
- contribute to the sustainability of the system of access to government information;
- encourage efficiency in the framing and handling of requests; and
- encourage a principled and consistent approach to the waiving of charges.

> The real test of a charging scheme is whether it rations access fairly.
>
> Alasdair Roberts
> Notes for Address to Media
> Association of Jamaica
> Seminar, February 2000

In consideration of these principles, the Task Force is recommending a new fee structure which differentiates between commercial requests and general requests, provides a separate fee structure for extremely large requests, and provides incentive for focused requests:

	Application fee	**Hourly Rate**	**Reproduction**	**Extremely Large Requests**
General Requests	$10	$5 per quarter-hour for search and preparation (after first five hours)	set rates for frequently used media; principles for other media (after first 100 pages)	for requests of either category, where the cost of processing is more than $10,000, institutions would have the *option* of charging the requester full-cost recovery
Commercial Requests	$10	$5 per quarter-hour for search, preparation and review	set rates for frequently used media; principles for other media	

Application Fee

The Task Force considered whether or not there should be an application fee. Experience here and in other jurisdictions has shown that a modest application fee can help to deter frivolous requests without interfering with the widespread use of the Act. In our proposed structure, most general requests would not require any additional payment beyond the application fee.

> It would seem that the best combination of accessibility and deterrence to frivolous applications might be found in the areas of $10 to $25.
>
> Green Paper, 1977

It is worth noting that although the Act allows for a fee of up to $25, the application fee has remained at $5 since 1983. It would be appropriate now to set it at $10 in order to index it to reflect inflation. The government may want to consider further indexing at appropriate intervals, possibly every five years.

5-9 The Task Force recommends that the *Access to Information Regulations* be amended to make the application fee $10.

A Differential Fee Structure – Commercial and General Requests

Unlike the Canadian law, the legislation in some other jurisdictions (such as British Columbia, the United States and New Zealand) have established fee structures that differentiate between categories of requests. Currently, approximately 40 per cent of requests under the Act are made for commercial purposes (e.g. corporations seeking information on a competitor's bid on a contract, or requests for information which the requester will repackage for sale), and that proportion appears to be growing.

There is nothing wrong with this. Such requests can encourage competitiveness, as well as transparency between business and government. Commercial requests were anticipated by Parliament when the Act was passed. What we need to consider is whether it is appropriate for the public purse to continue to underwrite these types of requests to the extent it does now.

In light of the public policy objectives of a legislated right of access, we have concluded that for the purpose of charging fees, it is appropriate to differentiate in this way. We believe the distinction should be between requests made primarily to further commercial interests, and those made primarily to further the public interest or to inform individuals.

5-10 The Task Force recommends that the Act and the Regulations be amended to reflect a fee structure that differentiates between commercial requests and general (non-commercial) requests.

It should be made clear that the types of requests normally received from academics, the media, Parliamentarians, non-profit public interest organizations, and members of the general public for their own use, are not commercial requests.

5-11 The Task Force recommends that the criteria for determining which requests are commercial be incorporated in the Regulations, and that these criteria make clear that the types of requests received from individual Canadians for their own use, as well as requests from academics, Members of Parliament, non-profit public interest organizations, and the media, are normally non-commercial.

Encouraging Focused Requests

The vast majority of access requests are quite small. A statistical analysis of 11,500 requests conducted for the Task Force found that 80 per cent of requests require less than five hours of search and preparation time, and result in the review and release of fewer than 100 pages of records. Such well-focused requests should be encouraged; so we suggest that no additional fees be charged to them beyond the $10 application fee. These requests should continue to receive up to five free hours of search and preparation time. In addition, we recommend that they receive up to 100 pages of reproduction (or equivalent in other media) for no additional fees.

This would make the system as easy, predictable and inexpensive as possible for the vast majority of people who make non-commercial requests. It would also provide an incentive for requesters to try to frame requests that require no more than five hours of search and preparation (and access officials should assist them in doing so). General requests that require more than five hours of search and preparation would be charged the prescribed rate for the additional hours. Those requests resulting in more than 100 pages of reproduction would be charged the set rate for the additional pages.

5-12 The Task Force recommends that non-commercial requests receive up to five hours of search and preparation time, and up to 100 pages of records (or equivalent) for the application fee, beyond which they be charged the hourly rate set by Regulation for search and preparation and the set rate for reproduction.

A Fee Structure for Commercial Requests

Jurisdictions that have established differential fee structures (such as the U.S. and B.C.) recognize that while there is a general right to information, it is being used in some cases mainly to further private commercial interests. In such cases, the fees are considered as a cost of doing business, and we believe that the fees levied should better reflect the cost of providing the information.

The fee structure for commercial requests should cover all reasonable time spent on searching and preparing records, as well as time spent reviewing records for release, at the hourly rate prescribed in the Regulations. Commercial requesters should also pay the set rates for reproduction of all the records they receive.

5-13 The Task Force recommends that commercial requests be charged the set hourly rate for all reasonable hours of search, preparation and review, and the set rate for all reproduction.

Fee Rates

For ease of administration and to make the structure understandable for requesters, we believe that there should be a single hourly rate prescribed in the Regulations for search and preparation for non-commercial requests and for search, preparation and review for commercial requests. The rate should reflect an indexing of the 1983 fee of $2.50 per quarter-hour, resulting in $5 per quarter-hour. This fee is much lower than actual cost recovery, but will still serve to encourage efficient use of the access system.

The reproduction rates currently listed in the Regulations do not include many of the newer media. Given that evolving technologies will likely lead to the creation and use of additional new media, it would make most sense to provide set fees for current common media (e.g. $0.20 per page of paper, $12 per 30.5-m roll of 35-mm microfilm), and establish a principle for charging for new media not yet listed (e.g. market value, or the price paid by the institution for the media, whichever is lower).

5-14 The Task Force recommends that the fee rates be updated to reflect inflation and the fee structure be updated to reflect the new media of reproduction.

Extremely Large Requests

The statistical analysis conducted for the Task Force found that less than 1.5 per cent of requests require a review of more than 1,000 pages, and less than 1 per cent result in a release of more than 1,000 pages.

Rarely, institutions receive requests that cover several thousand pages. These requests, which are of a completely different order of magnitude than most, raise important questions about the sustainability of the access to information system. No institution has the resources to handle requests of this size in their budget. Such huge requests could therefore result in other requesters being expected to accept delays, taxpayers paying for the hiring of extra staff or contractors to do the work, or other programs being compromised.

Occasionally federal institutions have to deal with extremely large requests – one, dealing with softwood lumber, involves over one million records. The cost of processing this request alone is estimated to be $1.3 million, involving a team of 12 to 15 people and an extension of 2 years.

David Flaherty
Research Report 25

Several jurisdictions have addressed this issue by allowing institutions to disregard extremely large requests. The *Freedom of Information Act* in the United Kingdom is the most precise: a public authority may charge an applicant full cost, or alternatively, does not have to comply with a request, where the cost of responding exceeds a set limit. At present, the limit is proposed to be £550 (about $1,100).

There have to be administrative limits on the scope and size of access requests, so as not to block more reasonable requests. It would likely be inappropriate for a department to expend all of its annual ATI resources on one request.

Robert Gellman, quoted in
Research Report 25

We do not believe that institutions should be allowed to refuse to process extremely large requests. We doubt, however, that the system can absorb them without problems. We believe that the people making requests of this size should pay for the extra staff required to process them. To ensure that this provision does not unreasonably interfere with the access rights of most requesters, the limit should be set high enough to affect only the small number of very large requests that the government receives each year. For the small number of requests with estimated processing costs of more than $10,000, we suggest that requesters have the option of narrowing their request, or accepting that the institution may charge them reasonable costs of processing (not the rate set in the Regulations).

To ensure effective monitoring of this provision, institutions' annual reports to Parliament should include information on its use. If, in any given year, more than 2 per cent of all requests across government have been processed under this alternate fee structure, Parliament should consider it an indication of a systemic problem, and the level of the limit should be reviewed.

5-15 The Task Force recommends that:

- **the Act be amended to provide that an alternate fee structure may be applied to the small number of very large requests where the cost of processing exceeds a set limit of $10,000;**
- **the alternate fee structure should provide for full recovery of any reasonable costs that can be directly attributed to the processing of the request; and**
- **institutions be required to report on their application of this section in their annual report to Parliament, and the limit be reviewed if the number of requests covered by the alternate fee structure exceeds 2 per cent of all the requests processed throughout government in any given year.**

Fee Waiver Criteria

The Act currently gives the head of a government institution the discretion to waive or refund a fee. We have observed that waiver decisions are not made consistently across government, nor is there a coherent rationale for these decisions. It would be helpful if requesters and access to information officials shared an understanding of the factors normally considered in a decision on waiving fees. We believe the factors should include financial hardship to the requester, the public interest to be served by disclosing the information, whether the amount to be collected is less than the expected cost of administering the fee, and the timeliness of the response to the requester. The timeliness factor would mean that the further past the deadline the information is disclosed, the greater the portion of the fees that should be waived (e.g. a two-day delay would not be likely to result in a waiver of a significant portion of the fees, whereas a two-week delay would be more likely to result in a waiver of a higher proportion of fees). There should, of course, be flexibility in decisions on waiving fees, to reflect the various circumstances relevant to particular institutions and to specific requests. If an institution regularly considers additional factors, it should let requesters know what they are.

✓

Use of consistent, coherent and transparent factors by institutions in determining whether to waive fees, and what portion of chargeable fees it is appropriate to waive.

We found that many institutions do not record their reasons for waiving fees, or even expressly waive the fees. They just don't collect them. In addition, we found that many institutions do not track the time spent processing requests once they have decided not to collect fees. The resulting lack of data makes it very difficult to assess the fee structure, the fairness in the application of fee waivers, or the time spent processing requests.

5-16 The Task Force recommends that:

- **the *Access to Information Policy* be revised to set out the factors to be considered in making decisions on whether to waive fees; and**
- **the criteria take into account the degree to which release of the information will serve the public interest, any financial hardship the fees would cause to the applicant, whether the amount payable is less than the expected cost of administering the fee, and the timeliness of the response to the requester.**

5-17 The Task Force recommends that institutions be required to:

- **track the time they spend on processing all requests, whether fees are collected or not;**
- **record the reasons for waiving fees; and**
- **include information on fee waivers in their annual report to Parliament.**

Expedited Delivery

All requesters should be given the option, at their expense, of having information sent to them on an expedited delivery basis (e.g. courier, Expresspost, fax).

5-18 The Task Force recommends that requesters be given the option, at their own expense, of expedited delivery by the method of their choice.

A Summary of the Proposed Fee Structure

The fee structure would include a $10 application fee, which would entitle non-commercial requests to up to five hours of search and preparation, and up to 100 pages of reproduction, after which they would pay the $5 per quarter-hour rate for search and preparation, and the set rates for reproduction. Commercial requests would pay the same application fee, then the $5 per quarter-hour rate for all reasonable time spent on search, preparation and review, and the set rates for all reproduction. Institutions would have the authority to charge up to full-cost recovery for any request (commercial or non-commercial) where the cost of processing exceeded $10,000. Institutions would have the flexibility to waive fees in keeping with published criteria for any type of request.

Review of Fees

Requesters have the right to complain to the Information Commissioner about any aspect of the processing of their request. If our recommendations are accepted, they would also have the right to complain about being charged fees for a commercial request, being charged fees under the alternate fee structure for very large requests, or about having their requests aggregated. In Chapter 6, we will consider the desirability of allowing requesters to seek further review of such issues by the Federal Court once the Information Commissioner has made a finding.

Reinvesting Fees

The fees collected under the Act will never amount to more than a small fraction of the costs of the access to information process, however, the government should consider reinvesting them in ways that will improve the functioning of the access system, by financing such things as technology development or increased training.

5-19 The Task Force recommends that the government reinvest the fees collected under the *Access to Information Act* in ways that will improve how the system works.

Multiple Requests

A high volume of small requests from one requester is likely to have the same impact on the system as one large request, diverting resources from other requests. For this reason, the United Kingdom, New Zealand and the United States have included provisions in their legislation allowing institutions to aggregate requests from the same requester or from multiple requesters acting together. We believe that this is a good approach. Such a provision in the Act, would allow institutions to extend the time-frame for responding, or to charge additional fees for the larger, aggregated request.

5-20 The Task Force recommends that the Act be amended to authorize institutions to aggregate requests where:

- **they are from the same requester or from multiple requesters acting together;**
- **they are on the same or a reasonably similar topic;**
- **they are received within 21 working days of each other; and**
- **the head of the institution is of the opinion that the requests were made in a manner intended to avoid fees or the application of a time limit extension.**

Duty to Assist the Requester

The most helpful response nominated consistently by interviewees is the "call-back" in which an ATIP coordinator contacts the requester in a timely way, goes over the request, makes suggestions for improvement, and so on.

Paul Attallah, Heather Pyman, Research Report 8

At the beginning of this chapter we recommended that institutions be encouraged to regularly contact requesters to clarify their requests. While keeping in touch with the requester is always a good practice, we believe that there are circumstances where an institution should be required to contact a requester: before refusing to process the request, before aggregating the request with other requests, or before charging full-cost recovery. This requirement should be set out in the Act.

The Act should also be amended to require that the institution make a reasonable effort to assist an applicant upon request, and offer to help the requester reformulate the request in a way that will avoid the negative outcomes. In this way, the requester will be notified first of what the institution intends, and will have an idea of what could be done to have the request processed quickly and for the lowest possible fee.

5-21 The Task Force recommends that the Act be amended to:

- **require institutions to make a reasonable effort to assist applicants on request; and**
- **require institutions to contact requesters before notifying them of a refusal to process their request on the grounds that it is frivolous, vexatious or abusive, or of a decision to aggregate the request with one or more other requests, or to categorize the request as subject to full-cost recovery, in order to assist them in re-formulating the request in a way that will avoid the negative outcome.**

Conclusion

Our recommendations for the fee structure reflect the principles that access to information is not a cost-recovery program, and that requesters should contribute to the cost of providing information, but that fees should not deter individuals from seeking access. It is also appropriate to charge higher fees for commercial requests that will be used for private financial benefit, and to allow institutions to charge full cost-recovery for the small number of extremely large requests that place an unreasonable burden on an institution's resources.

The length of time institutions are given to process requests would not change, but would be measured in working days instead of calendar days. Better communication between the institution and the requester would be required in some circumstances, and encouraged all the time.

We believe that the changes recommended in this chapter will improve both the functioning of the process and the communication between requesters and users. These changes would help provide the best possible service to requesters, while ensuring that an effective access to information system is maintained.

---

[1] In Alberta, the Commissioner may authorize an institution to disregard requests that would interfere unreasonably with operations. In Australia, institutions may refuse access if the work involved in processing the request would "substantially and unreasonably divert the resources of the Agency from its other operations". In Ireland, the head may refuse access where the number, or nature of records requested, would cause a substantial and unreasonable interference with, or disruption of, other work of the public body. In New Zealand, a request may be refused if the information cannot be made available without substantial collation or research.

[2] Legislation in Alberta, British Columbia, Manitoba, Ontario and Australia provides that a response is to be given within 30 days (with varying provisions relating to extensions). In Ireland, the time limit is four weeks. In Quebec, it is 10 days (with another 10 days possible), and in New Zealand and the United States it is 20 working days.

[3] Consulting and Audit Canada, *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation*, Treasury Board Secretariat 2000, Research Report 11.

[4] Given such views, and the strength of people's conviction, the number of fee-related complaints is surprisingly low (4 per cent of complaints in 2000-2001). This may, however, be a result of the high rate of fee waivers.

Chapter 6 – Ensuring Compliance: The Redress Process

The *Access to Information Act* provides for a two-tiered redress process. Requesters have the right to complain to the Information Commissioner about any aspect of a government institution's handling of their request. The Commissioner, an independent ombudsman, investigates complaints and makes recommendations to government institutions. If the government institution does not disclose information as recommended by the Information Commissioner, the complainant or the Information Commissioner with the complainant's consent, can seek judicial review in Federal Court. In practice, judicial reviews are rare. For example in 2000-2001, 1,337 complaints were investigated by the Information Commissioner. Only two resulted in applications to the Federal Court by the Commissioner.

The high level of success in resolving complaints with government institutions reflects positively on the effectiveness of the oversight model in place. On the other hand, in recent years, the relations between the Office of the Information Commissioner (OIC) and the government have become increasingly strained and there are now a number of proceedings before the courts dealing with the scope of the Commissioner's powers and with questions of procedural fairness.[1] This suggests that there are serious issues to be addressed.

First, we must state at the outset that we believe Parliament made a wise decision in creating the Information Commissioner as an independent body to review complaints under the Act. Successive Information Commissioners have been instrumental in furthering the objectives of the Act and in keeping access issues on the parliamentary, governmental and public radar screens. The Office of the Information Commissioner is an important Canadian institution that should be supported, and equipped with the powers and resources needed to meet the challenges of the future.

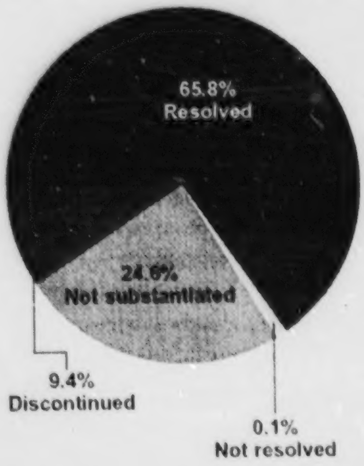
Secondly, we need to acknowledge that the role of Information Commissioner is a difficult one. The Commissioner is expected to be in turn a watchdog, an enforcer of rights, an educator, a mediator, a cheerleader for good practices, an advocate for access and an agent of change. The Office deals with extremely sensitive government and third party information. To be effective the Commissioner has to have the trust of the government, and of third parties who supply information to government and of Canadians making requests under the Act. Differences of views and tensions are inevitable in the redress process. However, we believe that, managed in a wise and mature way, these can be dynamic tensions that contribute to the development of our democratic life.

Since he is an ombudsman, the Commissioner may not order a complaint resolved in a particular way. Thus he relies on persuasion to solve disputes, asking for a Federal Court review only if he believes an individual has been improperly denied access and a negotiated solution has proved impossible.

Office of the Information
Commissioner of Canada
Web site

Fewer than 10 per cent of requests result in complaints initiated either by requesters, or by the Information Commissioner. And 99.9 per cent of complaints get resolved without resorting to the courts.

Disposition of complaints (2000–2001)



Invariably, the Information Commissioner is caught between opposing views and must find a way to balance the opposing views in an impartial manner to ensure that the integrity of the office will be protected and the trust and confidence of all parties maintained and, above all, that the principles of the Act will be met.

Paul Tetro
Research Report 27

Thirdly, we note a significant "perception gap" between the Office of the Information Commissioner, on the one hand, and government officials, including access to information officials, on the other. The Commissioner's Office, for example, is of the view that the investigation process functions well. Access officials, however, point to what they consider to be fundamental problems with the process. The Commissioner's Office is of the view that current tensions relate only to a very few high-profile cases. Government officials express more generalized concerns about the fairness and consistency of the investigative process and talk of a breakdown in trust. It is clear that attitudes and behaviours have been shaped by these different perceptions of reality.

We will examine four aspects of the redress regime: the rules governing the right to complain; the mandate of the Information Commissioner; the investigation process; and the structural model for the Information Commissioner.

Right to Complain

Administrative Review

Should requesters be required to ask the government institution for an internal review of its decision before making a complaint to the Commissioner? Administrative review mechanisms are found in several jurisdictions abroad, but not in Canada. The reviews are conducted either by a senior manager not involved in the first decision or by a separate unit in the institution, often the Legal Services.

Experience in the United States, Australia and Ireland suggests that an administrative review process results in the release of additional information and fewer formal complaints, because it provides an opportunity for problems to be resolved early and with a minimum of formality. Moreover, it can contribute significantly to organizational learning. Managers conducting the reviews develop a better understanding of the principles of the law and learn to refine their exercise of discretion.

On the other hand, an administrative review would add another step in the review process and may lead to more delay. It could erode the authority of the institution's Access Coordinator, whose decisions or advice would be subject to second-guessing by the officials conducting the review. Finally, it would impose an unwelcome additional burden on the time of busy senior managers.

In our view, these disadvantages are significant, and outweigh the benefits of an administrative review process for the federal access regime. However, we believe that some of the benefits of an internal review process could be realized by adopting three administrative practices:

- improved communications with requesters throughout the processing of the request (further discussed in Chapter 7), including at the time of the response, in order to answer questions and provide explanations;

The federal government should not, in any way, amend the ATI Act or change the access to information system to require dissatisfied requesters to await the completion of a departmental review process before making a complaint to the Information Commissioner.

Open Government Canada
Submission to the Task Force

- keeping the program officials who provided the information in response to the request informed of decisions on disclosure and involved in the resolution of complaints; and
- keeping senior management aware of the performance and challenges of the institution regarding ATI (further discussed in Chapter 10).

6-1 The Task Force recommends that an internal administrative review mechanism not be added to the current process.

Right to Complain About Fees

In Chapter 5, we recommended a new fee structure. There is no question that requesters should have the right to complain to the Information Commissioner if they believe their request has been improperly categorized as commercial, or if fees have been improperly assessed under the alternate fee structure. This right is already contained in Section 30 of the Act. It may be worthwhile to amend the Act to make this clearer.

The Act is not clear, however, about whether a complainant has a right to seek review by the Federal Court on a complaint about fees. This is a good opportunity to clarify that a complainant has that right regarding all fee-related issues.

6-2 The Task Force recommends that the Act be amended to provide that any applicant whose request has been categorized as commercial, who has had fees assessed under the alternate fee schedule, or who has been required to pay fees that the applicant considers unreasonable, may, after receiving a finding by the Information Commissioner, apply to the Federal Court for review.

Time to Complain

Timely complaints are desirable for efficient investigations and early settlement of issues. Section 31 of the Act stipulates that a complaint must be made to the Information Commissioner within one year after the request for information was submitted to the government institution. One year is a disproportionately long time in most cases. It can also be too short since processing some large requests can take more than one year. In such cases, requesters lose the right to complain before they have even received the institution's response, unless they keep the request alive by going through the motions of submitting an identical request, or the Information Commissioner initiates a complaint later.

We believe the best solution to this problem is to have the complaint period start, not when the request is originally made, but when the action is taken by the government institution that the requester wishes to complain about (for example when the requester receives the government's response, the notice of extension or the fee estimate). This is the approach taken in most of the jurisdictions that we examined. In our view, a period of 60 days would be appropriate for a requester to make a complaint. However, in some cases, government institutions may not respond to a request within the statutory time limit (i.e. within 30 days or such additional time as may have been claimed), and the requester may not be "notified" of such a deemed refusal. In these cases, the Information Commissioner should have discretion to allow a complaint to be made within a reasonable time.

6-3 The Task Force recommends that the Act be amended to require that a complaint be made within 60 days after notice is given of any decision of the institution. Or, if no notice has been given to the requester and the time limit set by the Act for responding has expired, a complaint must be made within such reasonable time as the Information Commissioner may allow.

Fees to Complain

A growing number of jurisdictions require the payment of a fee to launch a complaint. Experience there suggests that introducing a complaint fee could discourage legitimate complaints. We do not believe that this would be in the public interest.

6-4 The Task Force recommends that there continue to be no fee for filing a complaint with the Information Commissioner.

Mandate of the Information Commissioner

The Act simply stipulates that the Information Commissioner shall receive, investigate and report on complaints and make annual reports (and, where appropriate, special reports) to Parliament.

Although the Act does not prohibit the Information Commissioner from performing other functions, such as educating the public, neither does it authorize them. This may have led the Office of the Information Commissioner to define itself, at times, solely as an investigative body with strong coercive powers.

By contrast, most Information Commissioners in Canada and abroad, whether ombudsmen or quasi-judicial bodies, have a number of complementary responsibilities explicitly provided in their legislation. This well-rounded mandate allows them to be more effective agents of change and champions for access to information.

We believe that amending the legislation to provide the Commissioner with a positive mandate and a broader set of tools would further the objectives of the Act at the federal level as well.

Education Mandate

In the consultations conducted for this review, we noted a general lack of understanding of the access to information regime by the public, users and public servants. Obviously, this is an obstacle to the effective use of the Act.

We believe it would be desirable to amend the Act to empower the Commissioner to educate the public about the *Access to Information Act*. In our view, the Information Commissioner is uniquely positioned to perform this role: the Information Commissioner is already active in the field; has credibility with the public; has a broad view of the Act and its implementation; and has frequent contact with Canadians in the course of his work.

A lack of understanding of the intent, scope and limits of ATI legislation among most of those who are affected by it became very clear to us during this consultative roundtable process.

Report on Consultations to Review the Access to Information Act and its Implementation

As we will discuss further in Chapter 11, it is important that public servants, especially at the senior level, have a good understanding of the Act, its purpose and its democratic significance. The Office of the Information Commissioner could be an invaluable partner for the Treasury Board Secretariat in educating public servants. We believe that co-operative education endeavours between the Treasury Board Secretariat and the Office of the Information Commissioner would be extremely effective in promoting best practices, achieving greater consistency in access matters and setting the right "tone" for the access community.

It is clear from the experience in other jurisdictions, that an education mandate can be fulfilled without jeopardizing the impartiality and the independence of the Information Commissioner.

6-5 The Task Force recommends that:

- **the Act be amended to recognize the role of the Information Commissioner in educating the public about the Act and access to government information in general; and**
- **the Treasury Board Secretariat invite the Information Commissioner to participate in education programs for the public service.**

After an investigation, the Information Commissioner reports his findings in writing to the complainant and the institution involved. But to date, the federal Information Commissioners have published a relatively small number of case summaries in annual reports (eight in the 2000-2001 Report). In our view, it would be very helpful if such summaries were published more widely and if they were available on the Commissioner's Web site and indexed by subject matter for easy retrieval. They would be valuable to requesters, institutions and researchers in understanding the Commissioner's interpretation and application of the Act.

The Information Commissioner should publish decisions which have across-the-government impact, this would provide a narrowing and clarification of some of the questions regarding the processing of requests.

Canadian Access and Privacy Association Submission to the Task Force

There is no reason to believe that such publication of case summaries is incompatible with the requirement that the Commissioner protect confidential information or with his mandate as an ombudsman. We note that the Nova Scotia Information Review Officer, an ombudsman, publishes findings which have created a body of informal "jurisprudence" that has been influential in determining how the legislation is administered. However, it may require an amendment to Section 64 to ensure that case summaries are covered by the requirement to take precautions to avoid the disclosure of protected information.

6-6 The Task Force recommends that:

- **the Information Commissioner publish case summaries, including reasons for findings, on an ongoing basis, with a view to providing guidance to the institutions and to requesters; and**
- **Section 64 of the Act be amended to extend to the publishing of case summaries the duty of the Information Commissioner to take reasonable precautions to avoid the disclosure of protected information.**

Advisory Mandate

Legislation in several jurisdictions gives Information Commissioners an advisory function.

We believe that there are many circumstances in which the Treasury Board Secretariat, or a government institution, would benefit from the advice of the Information Commissioner. For example, advice on proposed legislation, regulations, policies or programs that could have an impact on access to information; advice on guidelines; advice on the administration of the Act in an institution; and advice on information management practices, and policies. We believe this advice would be particularly useful to institutions in setting up the strong proactive and informal release strategies we are recommending in Chapter 8.

In my view, it is unfortunate that the Treasury Board Guidelines have not been updated through a collaborative approach including advice and views of the Information Commissioner. As a result, coordinators are left to deal with two sets of rules, the Guidelines and the guidance that can be inferred from the results of the Commissioner's investigations.

Barbara McIsaac
Research Report 28

6-7 The Task Force recommends that the Act explicitly recognize the role of the Information Commissioner in advising government institutions on the implications for access to information of proposed legislation, regulations, policies or programs of the government, on the administration of the Act in institutions, and in encouraging institutions to adopt good practices, including the proactive dissemination and informal release of information.

Practice Assessment Mandate

The redress mechanism under the Act is triggered by individual complaints. A complaint-driven redress system is effective in dealing with concerns about the disposition of specific access requests. It is less effective, however, in dealing with systemic issues, such as chronic delays, and in fostering learning in institutions.

The Information Commissioner has recognized the need to address systemic issues. In recent years, he has started to assess the performance of departments in meeting the mandatory response deadlines. We believe this "report card" process has been useful in drawing the attention of senior management in the departments concerned to the processing problems in their organizations and the need to correct them.

At this point, the only formal mechanism available to the Commissioner for this purpose is the self-initiated complaint under subsection 30(3) of the Act. This mechanism, requiring as it does "reasonable grounds to investigate," focuses the review on a specific problem and may carry a negative connotation. Practice assessments, on the other hand, would allow for a more general review of the systems and facilitate working with institutions to find solutions to entrenched problems. They would result in negotiated remedial action plans.

Practice assessments targeting systemic issues would in most cases involve several departments. For several reasons, we suggest that these assessments be carried out co-operatively by the Treasury Board Secretariat and the Office of the Information Commissioner. The President of the Treasury Board, as the designated Minister, already has authority to conduct such assessments under Section 70(1)(a) of the Act.

We believe that such a collaborative approach would be more effective and welcomed by institutions. The assessed institutions, the Treasury Board Secretariat and the Office of the Information Commissioner would define together the parameters of the assessment, agree on its conclusions, and agree on a remedial action plan. This would help to ensure effective system-wide action and learning.

The Treasury Board Secretariat, with its government-wide responsibility for the administration of the *Access to Information Act* as well as for audit and evaluation, has a great deal of experience and sound practice to contribute to such assessments. From our consultations with other jurisdictions, we have found that obtaining the necessary resources for this type of activity has been a challenge. A partnership approach involving the Office of the Information Commissioner, the Treasury Board Secretariat and government institutions, should help to ensure adequate funding and support. Finally, practice assessments would provide one more opportunity for the Treasury Board Secretariat, government institutions and the Information Commissioner's Office to work collaboratively to resolve access problems and to improve the system. In our view, this could go some way towards rebuilding trust and diminishing the current level of tension.

The authority to conduct such practice assessments would have no impact on the regular investigative powers of the Commissioner. It is compatible both with the Information Commissioner's independence and the Commissioner's other responsibilities. In our view, the addition of this "softer" tool is likely to generate learning in institutions and long-lasting progress in the system.

> The "approach" adopted by any Information Commissioner is a crucial variable in promoting an effective ATI regime and compliance.
>
> David Flaherty
> Research Report 25

6-8 The Task Force recommends that:

- **the Act be amended to authorize the Information Commissioner to conduct assessments of practices of institutions having an impact on compliance; and**
- **the Office of the Information Commissioner and the Treasury Board Secretariat collaborate in conducting assessments of institutional practices.**

Mediation Mandate

Information Commissioners in all of the jurisdictions we studied attempt to resolve disputes through mediation, regarding this as the most effective and efficient means to settle complaints. Resolution of complaints through mediation was introduced by the first federal Commissioner, notwithstanding the lack of a statutory mandate for this role. Legislation in most provincial jurisdictions specifically provides for a mediation role.

The Information Commissioner's Web site describes his role as "mediating between dissatisfied applicants and government institutions." However, possibly because of a lack of specific statutory mandate, the Office of the Information Commissioner occasionally questions whether mediation is compatible with the primary mandate to investigate complaints.

Complaints should be mediated prior to a formal costly investigative process.

Canadian Access
and Privacy Association
Submission to the Task Force

We have also observed that the mediation process is not always well understood. For example, there should be opportunities in appropriate cases for departments and requesters to sit down together to try to work out a resolution to a complaint. Some departments have been reluctant to engage in this form of mediation, however, we have heard from other jurisdictions that it can be quite successful.

After discussing this issue with several jurisdictions, the Task Force is strongly of the view that effective mediation is a critical component of a well-functioning access to information redress scheme.

We believe that expressly recognizing mediation as part of the Information Commissioner's mandate would bring clarity and legitimacy to this crucial activity for both institutions and complainants.

Settlement is not an exercise designed to reduce the rights of requesters in any way. It is aimed at narrowing the differences between the parties.

Information Commissioner
of Ireland
Annual Report 1999

Mediation in the context of an investigation by an ombudsman may not be structured exactly as in a quasi-judicial inquiry. However, some of the same characteristics need to be present: the process should be clear for all the parties, and flexible and informal enough to reach the best possible resolution in the circumstances. In both British Columbia and Ontario, it is clearly stated in published procedures that the mediation phase is separate from a subsequent formal inquiry phase. We believe there is a need, at the federal level, for more procedural clarity and more recognition of mediation as an important compliance tool.

It would be highly desirable if officials from both the Office of the Information Commissioner and government institutions that are involved in mediation have the necessary authority to reach a settlement, with the consent of the complainant.[2] There may be a few exceptions, especially on sensitive files or cases that raise new issues, but this is generally recognized to be a requirement for effective mediation. Such authority should be the general rule, as it is in most Canadian jurisdictions. In our view, there is nothing inherently different in the ombudsman model that would impede this kind of delegation.

The mediation function on meeting timelines for access requests with government departments and agencies is crucial to the success of openness and accountability.

David Flaherty
Research Report 25

6-9 The Task Force recommends that:

- **the Act be amended to formally empower the Information Commissioner to attempt to effect the settlement of complaints through mediation;**
- **the mediation process be articulated and communicated to both institutions and complainants; and**
- **as a general rule, Access to Information Coordinators and officials from the Office of the Information Commissioner should be delegated the authority to agree to mediated solutions to complaints.**

Investigating Complaints

Even with the addition of this broader mandate, investigating individual complaints would remain the primary function of the Information Commissioner under the Act.

Whichever model of redress is chosen, we submit that strong powers of inquiry and/or investigation must be provided.

Ann Cavoukian
Ontario Information and
Privacy Commissioner
Submission to the Task Force

There is no doubt that the Information Commissioner needs strong and effective powers to carry out the responsibility for conducting independent reviews of access decisions made by government institutions. Moreover, these powers must contain some coercive elements to ensure the co-operation of institutions in all cases.

The federal Information Commissioner has essentially the same investigative powers as his provincial counterparts.[3] We believe that the Commissioner's investigative powers and responsibilities are appropriate and sufficient to enable the Office to carry out its investigative responsibilities. These powers should be retained.

While the investigative powers of all Canadian Information Commissioners are largely similar, a number of investigative practices set the federal Information Commissioner apart. In recent years, there has been an increase in the number of formalized investigations involving subpoenas, examination of witnesses under oath, and confidentiality orders. The use of these powers occurs in only a minority of investigations, but it is a distinct and growing trend and represents a significant departure from the past. It has raised issues of procedural fairness, strained the relationship between government officials and the Office of the Information Commissioner and has come to colour, perhaps disproportionately, the perception federal officials have of the investigative process.

The Investigation Process

When a complaint is received in the Information Commissioner's Office, it is assigned to an investigator, who reviews the file and tries to settle the complaint at the working level. If that is not possible, the matter is brought to the attention of the senior management of the institution with a view to resolving it at that level. If this negotiation is unsuccessful, more formal powers of investigation are brought into play.

The Task Force found that for the vast majority of investigations, any tension arises from problems with communication between investigators and government institutions, clarity of the procedures being followed, and consistency of approach. We believe that the solution lies in better communications, and more structure, discipline and consistency on the part of both the institutions and the Commissioner's office.

A Shared Understanding

Access officials in institutions have suggested they have not been given a clear picture of the process being followed in some investigations. Overwhelmingly, they ask for a clear and consistent investigation process. Requesters have also expressed the view that the Commissioner's procedure needs to be more transparent and they would like to be more involved in the process of resolving their complaint.

The Office of the Information Commissioner has developed an intensive training program and extensive internal procedures manuals for its investigators. The day-to-day activities of investigators are supported by impressive internal resources which include not just manuals, but a Code of Professional Conduct, and a grid for the analysis of the application of exemptions, exercise of discretion and delay issues. This grid is supplemented by a data bank of the previous findings of the Information Commissioner. It is clear that successive Information Commissioners have made serious efforts to equip investigators with the tools to conduct fair, disciplined and consistent investigations.

> [T]he Commissioner has done a lot of very good work in developing resources for his investigators and that work should be shared more widely with the access community.
>
> Barbara McIsaac
> Research Report 28

It is not obvious, therefore, why Coordinators perceive that there is a lack of clarity, focus and consistency in the investigation process. In our view, these perceptions may be due largely to communication problems.

There will be occasions when the Commissioner determines that it is necessary to issue subpoenas and hold hearings of a more formal nature. These types of investigations can be even more stressful for institutions. It is even more imperative, therefore, that there be clear information communicated to government institutions on how the Commissioner's Office will proceed and what rights and obligations individuals have when they are involved in such an investigation.

We have noted that other Information Commissioners publish their policies and procedures. For example, the policies and procedures of the British Columbia and Ontario Commissioners are posted on their Web sites.[4] They provide parties, witnesses and counsel with an indication of how the investigation will be conducted. Those involved, therefore, know what to expect.

As a first step in improving the efficiency and effectiveness of investigations, we believe it would be beneficial if the Commissioner developed and published procedural guidelines governing the conduct of both routine and more formal investigations.

We would expect these guidelines to be consistent with principles of procedural fairness and natural justice, especially in the case of formal investigations. While this may be not strictly required for administrative investigations, it can only enhance the credibility of the investigation process and respect for the Office of the Information Commissioner.

Transparency in the investigative process and more information as to how the Office of the Commissioner views, and will be assessing the application of exempting provisions... would go a long way to alleviating some of the tension that currently exists.

Barbara McIsaac
Research Report 28

6-10 The Task Force recommends that the Information Commissioner prepare and publish comprehensive procedural guidelines for investigations, which should be consistent with the requirements of procedural fairness.

An investigator must have the ability to remain neutral between the complainant and the government, not being biased for or against either party, not having a stake in the outcome of the investigation other than the law be followed.

John Reid
Information Commissioner
Presentation to the External
Advisory Committee
June 2001

Access officials have indicated that they would welcome training on the investigative process and their role in it. They have also expressed an interest in participating in joint sessions with the Investigation Unit of the Commissioner's Office to develop a better common understanding of the investigative process and to explore issues of a general nature that have proved to be problematic. We believe that such initiatives would help improve both communication between access officials and the Office of the Information Commissioner, and the efficiency of investigations. It would be time well spent.

The Office of the Information Commissioner has developed a very useful grid for investigators to evaluate the application of the exemptions and extensions.[5] This kind of tool should be shared with institutions. Investigations should not take institutions by surprise. On the contrary, the better prepared the file and the Coordinator are, the more efficient the investigation will be. This would be exceptionally helpful for institutions that are less experienced with investigations, to assist them in preparing.

In general, institutions find investigators well trained and very professional. They would, however, like different investigators to be more consistent in their approach to the same issues, and they would like the investigators to have a deeper understanding of the business of the institutions. They suggest organizing investigators by portfolios, as is done in many provinces, so they can get to know areas of government activities and make more informed judgments more quickly. We

The Office of the Information Commissioner should see their investigative process as a partnership and it should be seen as an opportunity to learn by departments.

Access to Information Coordinator

believe this would make investigations more efficient, understanding that there would be a need for investigators to change portfolios from time to time to safeguard their impartiality.

6-11 The Task Force recommends that:

- **training and information sessions on the investigative process be offered to access officials by the Office of the Information Commissioner;**
- **investigators of the Office of the Information Commissioner meet from time to time with access officials to clarify and resolve general issues related to the investigation process in order to make investigations more efficient and effective;**
- **tools for the investigation be developed that would guide both investigators and institutions in the efficient resolution of a complaint; and**
- **investigators be assigned to specific portfolios of government institutions to enhance their understanding of those institutions, with periodic rotation of assignments.**

Clarity as to Issues Under Investigation

[E]ven experienced coordinators report being at times surprised at how investigations are carried out, being uncertain about the focus of the investigations, and in some cases startled when new aspects of a complaint surface quite late into the investigation.

Barbara McIsaac
Research Report 28

Access to Information Coordinators have told us that they are, at times, unclear about the focus of an investigation and sometimes new issues are raised quite late in the investigation. This is not only a source of unnecessary aggravation, but the lack of clarity makes it difficult for institutions to respond efficiently.

The reason for this is unclear, as the Office of the Information Commissioner spends a lot of time talking with complainants in order to clarify their complaints. Notice of complaints should establish the parameters of the investigation and provide enough details to the institution about the points on which the investigation will focus.[6] After reviewing the file, it would be good practice for the investigator to confirm in writing the points to be resolved. This would make investigations more efficient and better position Coordinators to assist the Commissioner's Office.

6-12 The Task Force recommends that investigators provide institutions, as early as possible in the course of the investigation, with a clear and complete understanding of the issues to be resolved.

Documenting the Handling of the Request

Better documented files in institutions – recording the rationale for exemptions claimed for example – would also contribute to more efficient investigations.

We recognize that taking the time to fully document the process file may conflict with providing a response within the statutory timelines. Detailed rationales are not needed for all exemptions claimed. However, recording the rationale, where appropriate, would not only save having to reconstruct the file during an investigation, it would also foster a clearer and more principled exercise of discretion by institutions under the Act.

6-13 The Task Force recommends that the Treasury Board Secretariat, with the advice of the Office of the Information Commissioner, work with institutions to develop realistic standards for the documentation of process files.

Investigations into Process Matters

Complaints to the Commissioner can relate to process matters, such as the fees charged, the format and language of a response, delays, and extensions of time to respond to a request. We believe that investigations into these sorts of complaints ought to be relatively straightforward especially in cases of delays. The facts are simple to ascertain. They should be conducted expeditiously to provide an effective avenue of redress for requesters.

Complaints on process matters accounted for 60 per cent of all investigations in 2000-2001 – 43 per cent were on delays.

The Commissioner's latest Annual Report indicated that these investigations currently take, on average, from three months (deemed refusals) to seven months (fees). It also appears that the length of time required to investigate these matters has been increasing in recent years. While the length of investigations is due in part to limited resources in both the Commissioner's Office and government institutions, we believe that there could be improvements. The Office of the Commissioner has set up a special unit to deal with complaints relating to delays. Many provincial jurisdictions have also put in place a streamlined process for process issues which ensures that such complaints are dealt with quickly.

By the time the delay investigation starts, a late response may or may not have been processed. Where it has not, the investigator will review the file and talk to access officials to assess the circumstances. The government institution will then be asked for a commitment to comply by a date the Commissioner's Office considers to be reasonable in light of all the circumstances. However, when the request has already been processed by the institution by the time the investigation is initiated, it is not clear why investigators need to review the whole file to check the completeness of response and appropriate application of exemptions. We believe that a more streamlined process and focused fact finding would be appropriate.

Efficiency has to be improved on the side of institutions as well. Better use and documentation of time extensions and fee calculations could both diminish the number of process investigations and make them more efficient.

The time taken by institutions to respond to investigations also needs to be improved. There may be a tendency in institutions to give priority to processing new requests ("to keep out of trouble") instead of responding in a timely way to investigations (since "they are already in trouble"). This attitude may be less than fair to complainants.

There should be standards set in ATI units for responding to investigations, especially process investigations. Resource planning should take these standards into consideration, as well as the time needed to respond to these types of investigations in the past.

We believe that any improvement in the efficiency of investigations on the part of the institutions or the Office of the Information Commissioner will benefit everyone involved.

Many stakeholders stated that the Information Commissioner should put the onus of justifying decisions to release or not to release on departments.

Report on Consultations to Review the Access to Information Act and its Implementation.

6-14 The Task Force recommends that:

- **the procedure for investigating process issues such as fees, delays, extensions and format, be reviewed for ways to resolve them in as short a time as possible; and**
- **institutions come up with standards for responding to investigations, and plan for reasonable resources to meet these standards.**

Reviews Conducted in Writing

We have noted that most provincial Information Commissioners conduct the majority of their investigations and hearings in writing. At the federal level, there may be a tendency at times to overdo personal interviews, where written statements could work just as well. "Paper reviews" are not appropriate for all cases and there is certainly value in conversations between access officials and investigators. However, documentary investigations can bring clarity and discipline – especially to big, complex files – and could possibly expedite the process on simples ones. The federal process could learn from the experience of the Canadian provinces in this respect. "Paper reviews" would, however, require better documented process files and discipline on the part of all those involved.

6-15 The Task Force recommends that the Information Commissioner, in consultation with the Treasury Board Secretariat, study the suitability of reviews conducted in writing for some types of investigations.

Timely Investigations

The Information Commissioner is not subject to any time limit in responding to complaints. In his Annual Report for 2000-2001, the Commissioner indicated that the average investigation time was 5.4 months. It was 7.8 months for 2001-2002.

At one point we assessed our activities and realized we were spending more time supporting investigations than responding to requests. This has led to a review of our management of both.

Assistant Deputy Minister

Alberta, British Columbia and Manitoba all impose time limits on investigations. In British Columbia, an inquiry must be completed within 90 days of receiving a request for review. Alberta and Manitoba also have a 90-day time limit, but give their Commissioners the ability to extend the deadline by notifying interested parties that they are doing so, and providing an anticipated completion date. Provincial Information Commissioners informed the Task Force that these time limits are adequate to conduct effective mediation.

At the federal level, some investigations go beyond the original complaint, for example, when the complaint is about delay. Moreover, institutions do not always respond as quickly as they should in order to proceed expeditiously with investigations. Not surprisingly, many complainants are unhappy with the time required to resolve their complaint.

We believe that imposing a statutory time limit on investigations would bring more discipline and focus to them. In our view, a limit of 90 days would be appropriate, giving the Commissioner discretion to extend this period if necessary after giving notice to the complainant, the government institution involved, and any third parties.

A time limit on investigations will require institutions and the Office of the Information Commissioner to adjust some of their current processes and it may require some initial additional resources. However, we believe that moving to more timely investigations should generate savings in the long run. Delayed and extended investigations are costly. Turnover in staff and changing circumstances often mean that the facts and issues have to be revisited needlessly.

Most requests and subsequent complaints have a time sensitivity. Being told months or years later that the complaint was or was not justified is by then of little interest to the requester.

Submission to the Task Force

6-16 The Task Force recommends that the Act be amended to require the Information Commissioner to complete investigations within 90 days, with the discretion to extend this period for a reasonable time if necessary, on giving notice of the extension to the complainant, the government institution involved and any third parties.

Role of Complainant

Complainants have indicated that they would like more information about the investigations and more involvement in them. Requesters who are familiar with the investigation process in provinces such as Ontario or British Columbia believe these to be more effective from their perspective.

We recognize the need for the confidentiality of the Commissioner's investigations, but recognize as well the merits of providing information to complainants and involving them to the extent possible in the resolution of their complaints.

Our recommendations in this chapter on the confidentiality of investigations and on the Commissioner developing and publicizing investigation procedures and guidelines, should facilitate appropriate involvement of complainants.

6-17 The Task Force recommends that the Commissioner's procedural guidelines allow for greater involvement of complainants in the investigation process.

Formal Investigations – Ensuring Procedural Fairness

Formal investigations that use subpoenas and examination of witnesses under oath, represent a small minority of all investigations. However, they have become more frequent in recent years and they raise a number of new issues relating to procedural fairness. Their impact on government officials' current perceptions of the investigation process cannot be overstated.

Having been through this process myself, I would not want one of my employees subjected to this kind of experience.

Deputy Minister

We have emphasized earlier that the Information Commissioner needs strong investigative powers to fulfil his mandate. However, the exercise of formal investigative and coercive powers must be consistent with impeccable procedural fairness at all times. And it must be perceived to be so by those involved in the process.

Our recommendations are intended to meet that objective, and we believe that the Information Commissioner is in complete agreement with this goal.

Confidentiality of the Investigations

Section 35 provides that investigations must be conducted in private. The main purpose, we believe, is to ensure that any information that a government institution is entitled to withhold is not released until the issue of disclosure is finally resolved. This is fundamental to any access to information regime. Investigations conducted in private also ensure that the Commissioner and his delegates can talk frankly with witnesses.

But we do not believe that these important objectives require that all investigations be held in strict privacy. A number of other jurisdictions, including Alberta, British Columbia and Ontario, provide that investigations *may* be conducted in private, giving the Commissioner discretion to determine whether or not a private investigation is required in the context of the specific complaint. Indeed, depending on the circumstances, some forms of complaint resolution – such as mediation – can be more effective with the parties present.

In our view, the Information Commissioner should be given the discretion to conduct investigations in private, but not be required to do so. The Commissioner's legislated duty to maintain the confidentiality of the information until final resolution of the access complaint is sufficient to safeguard the integrity of the information.

[R]estrictions on who can appear as counsel, whether counsel can represent an employee and the employer and who witnesses can talk to seems excessive – especially when routinely imposed [ ] These restrictions, which are not required by the legislation and which evidence a profound distrust of government institutions and public servants, seem unwarranted.

Barbara McIsaac
Research Report 28

At the federal level, the obligation to conduct investigations in a confidential manner appears at times to have been taken further than is reasonably required to protect either the confidentiality of the information or the frankness of an interview. In recent years, the Information Commissioner has on occasion asked witnesses to sign confidentiality agreements or imposed confidentiality orders on them, prohibiting them from discussing their evidence with others in their institution, except for their legal counsel. Counsel themselves have on occasion also been subjected to confidentiality agreements or orders.

There may be rare instances where such a measure is warranted, and in these cases the Commissioner should have the power to impose such restrictions. However, our concern is that this practice can prevent institutions and individuals from presenting a full response if they cannot discuss the matter among themselves.

In addition, this practice implies a belief in a lack of integrity of government officials and may have contributed to the current erosion of trust. As far as we have been able to determine, confidentiality orders are not used by commissioners in other Canadian jurisdictions and it is not clear why they should be required at the federal level to the extent they are currently used.

6-18 The Task Force recommends that:

- **Section 35 of the Act be amended to provide that investigations *may* be conducted in private; and**
- **investigation procedures, including the need for confidentiality, not prevent government institutions or individuals from presenting a full response in the course of an investigation.**

Right to Counsel

At common law, neither a party nor a witness involved in administrative proceedings has an absolute right to be represented by counsel. However, most jurisdictions that we examined (including British Columbia, Alberta and Ontario) provide a right to counsel in their legislation. We have learned that the practice in most other jurisdictions is to allow counsel whenever requested. This has been the practice at the federal level as well. However, there have occasionally been restrictions on who can appear as counsel and who they can represent.

The right to choose one's own counsel is a very important principle in law. It is also quasi-constitutional just as the *Access to Information Act* is quasi-constitutional legislation.

Mr. Justice McKeown,
AG of Canada and Hartley v. Information Commissioner of Canada, F.C., February 1, 2002

There is a concern that providing a right to counsel might lead to more formality in what should ideally be relatively informal proceedings. However, with the increasing use of formal hearings where witnesses are required to testify under oath, and with the possibility of being found in contempt if questions are not answered, we believe that any witnesses testifying under oath should have a statutory right to counsel.

While there does not appear to be a consistent practice in this regard, the Information Commissioner has on occasion refused to allow public servants to be assisted by lawyers from the Department of Justice or other lawyers representing the employer without having them sign a confidentiality agreement. We are not aware of any similar restriction in other jurisdictions.

The Office of the Commissioner indicated to the Task Force that this was done to protect the interests of witnesses and that the witnesses had, in most cases, the discretion to waive confidentiality and allow counsel to speak with their institutions. This may not have been understood by the witnesses. If some witnesses wanted the protection of binding confidentiality, it is clear that others have felt unfairly constrained by it.

I prefer to conduct my investigations by consent and cooperation. Our normal *modus operandi* is to meet with government officials informally, to receive records which are voluntarily produced. Officials are seldom put on oath and recorded during their evidence. [ ] Informality fosters an atmosphere of mutual trust between the public service and my office.

John Reid
Information Commissioner
Presentation to the External
Advisory Committee,
June 20, 2001

Where there is a conflict between the interests of the witness and those of the institution, there should clearly be separate legal representation, but those circumstances would be rare. In processing access requests and explaining the reasons for decisions made, public servants are, after all, acting on behalf of their institution. We believe the question of representation should be one for the witness, not the Commissioner. The Commissioner may, however, in his investigative guidelines want to alert witnesses to the possible conflict of interest and witnesses' choices in the matter.

6-19 The Task Force recommends that:

- **the Act be amended to provide witnesses testifying under oath with a right to legal representation; and**
- **witnesses have the right to choose their legal representative.**

Subpoenas

All provincial Information Commissioners have the power to issue subpoenas to compel witnesses to give oral or written testimony or to produce documents. These provisions are, however, rarely used. For example, in British Columbia, no subpoenas have been issued within the past eight years. In contrast, the federal Information Commissioner issued 21 subpoenas in 2000-2001 and 7 in 2001-2002.

Subpoenas have been issued in instances where officials have refused to take part in investigations or to produce documents. In some cases, on the advice of their counsel, officials have requested that they be issued with subpoenas in order to safeguard their procedural rights. In some cases, subpoenas were issued as a result of a simple disagreement on the scheduling of an interview. The Commissioner has made no secret of the fact that, in a few cases, he has used his power to subpoena as a tool to heighten awareness among decision-makers of chronic under-funding, poor decision-making processes and disregard for legislated timelines.[7]

In a number of cases, subpoenas have been served on Ministers and Deputy Ministers. As might be expected, this has had a major impact. The governmental culture is not one in which subpoenas are frequent, and they are not taken lightly.

The Commissioner insists that subpoenas are issued only as a very last resort when everything else has failed.[8] Many government officials, however, believe the current use of the subpoena power to be excessive. The Task Force does not intend to second guess the judgment of the Commissioner with regard to his handling of individual investigations. However, we believe that the unusually high number of subpoenas, compared to provincial jurisdictions, is indicative of a breakdown in the relationship between government officials and the Information Commissioner.

> My investigations of systemic delays in the system lead me inevitably to the doorsteps of Deputy Ministers. [ ] I wanted those with the power to solve delay problems through resource allocation and leadership, to answer.
>
> John Reid
> Information Commissioner
> Presentation to the External Advisory Committee, June 2001

The power to subpoena witnesses and documents is a powerful instrument, with a powerful impact. It should be used with extreme restraint, only where other means to obtain documents or testimony fail. However, we recognize that there will be instances where it will be appropriate to use the subpoena power.

Under the United Kingdom legislation, the Information Commissioner has to apply to the courts for a subpoena. The same is true with the Review Officer under the Nova Scotia Act. We do not believe that adding this extra step to the federal regime is warranted. The power of the Information Commissioner to issue subpoenas is normal and appropriate.

However, the Information Commissioner should take into account the factors normally considered in any exercise of a subpoena power, such as relevance (who has direct involvement and actual knowledge of the file and exemptions applied) and procedural fairness, and recognize the practical realities of institutions. Prior to issuing a subpoena to a witness or for documents, a good practice is for the Information Commissioner to provide clear and adequate notice in order to allow officials to prepare and seek counsel if they so wish. Advising Access Coordinators when departmental officials are being subpoenaed in an investigation is also a good practice.

> The inquisitorial, law enforcement approach to ATI compliance may have a place in selected situations, where other approaches have consistently and demonstrably failed. It is, however, not the preferred approach as a general regulatory stance
>
> David Flaherty
> Research Report 25

Other procedural safeguards recommended in this chapter should remove the perception of some public servants that their rights are only protected if they have been issued a subpoena, and thus contribute to a more restrained use of the subpoena power.

6-20 The Task Force recommends that:

- **no application to the Federal Court be required for the issuance of a subpoena by the Information Commissioner under the *Access to Information Act*;**
- **subpoenas be limited to investigations of specific complaints, not broadly based inquiries about the functioning of the access process;**
- **subpoenas only be issued to officials who have actual knowledge of the file; and**
- **the Information Commissioner's procedural guidelines provide that appropriate notice be given to institutions, witnesses and Access Coordinators that a subpoena will issue.**

Notice to Affected Individuals

The Act does not require the Information Commissioner to give notice to individuals, other than the complainant and the head of the institution, who might find themselves involved in an investigation. In several other jurisdictions, there are statutory provisions permitting commissioners to notify individuals whose conduct in relation to the processing of a request might come under scrutiny.

The *Access to Information Act* clearly needs some changes to protect public servants who sincerely and honestly carry out their duties. As the consequences to their careers may be catastrophic, they need the protection of a process that adheres to the *Canadian Charter of Rights and Freedoms*.

Submission to the Task Force

The Commissioner has recognized the obligation to act fairly and has developed a procedure of providing a Notice of Possible Adverse Findings to individuals. However, this notice comes fairly late in the investigation and, until that point, the individual may have no idea that allegations have been made against him or her, and that his or her conduct is under investigation.

We believe that the Act should be modified to provide for notice to any person the Commissioner considers appropriate, either at the outset or as early as possible into the investigation. The guidelines developed by the Commissioner should make clear that notice will be given to any person whose actions or conduct are called into question by the complaint or during the investigation.

We also believe that the current practice of giving notice of possible adverse findings to individuals should be formalized in the Commissioner's guidelines and notice given as soon as there is an indication that an individual might be adversely affected by any findings or comments in the Commissioner's report.

6-21 The Task Force recommends that:

- **Section 32 be amended to extend the duty of the Commissioner to give notice to the head of the government institution and provide information on the complaints before commencing an investigation, to any person the Commissioner considers appropriate;**
- **the Commissioner's procedural guidelines provide that notice will be given to any person whose actions or conduct are called into question by a complaint; and**
- **the Commissioner's procedural guidelines provide that a notice of possible adverse findings will be given to individuals as soon as there is an indication that they might be adversely affected by any findings or comments in the Commissioner's report.**

Solicitor-Client Privilege

Section 36(2) of the Act provides that the Information Commissioner may examine any record notwithstanding any privilege. There is no dispute that the Commissioner should have the power to review documents for which solicitor-client privilege is claimed as an exemption. However, the language of Section 36(2) is broad enough to cover legal advice provided to an institution or a witness on their rights and obligations in the context of a case in dispute. This result may not be compatible with procedural fairness.

Other Canadian jurisdictions have similar provisions but have consistently interpreted them more narrowly, requiring, for example, an affidavit as to the nature of the document instead of a copy of the legal advice itself.

The Information Commissioner's current practice is to require the production of legal advice given to an institution about the issue in dispute, unless it was given after the investigation has begun.

New Zealand and United Kingdom legislation draws a clear distinction as to the jurisdiction of the commissioners between solicitor-client privilege when applied as an exemption to the disclosure of information, and legal advice to an institution on its access obligations.

We believe institutions should have the same right to confidentiality when they obtain legal advice on their rights and obligations under the Act as any other person. Moreover, when a public servant seeks legal advice on an individual basis, there should be no doubt that communications with counsel are privileged and cannot be compelled by the Information Commissioner.

The fact that the federal Information Commissioner is an ombudsman and can only make recommendations, does not, in our view, ultimately determine this issue. The Commissioner is part of a two-tier redress process that involves judicial review, where the government institution and the Information Commissioner could end up on opposite sides in a Federal Court proceeding.

6-22 The Task Force recommends that the Act be amended to provide that the Information Commissioner cannot compel an institution or an individual to produce a communication from or to a legal advisor about the client's rights and obligations under the Act or in contemplation of proceedings under the Act.

Contempt Powers

The Information Commissioner has the power of a superior court of record to cite a witness for contempt; however, the Act does not provide any specific mechanism for the trying of that charge. When a judge cites for contempt, the charge is usually heard by another judge of the same court to ensure both impartiality and the appearance of impartiality. However, in the case of the Office of Information Commissioner, this would be difficult to carry out given that there is only one source of authority for that office, and that all the authority vests in the Commissioner.

The Commissioner has previously responded to this difficulty by arranging for a retired judge to deal with a contempt charge that arose in the course of an investigation.

We believe that procedural fairness and the appearance of impartiality would be best served if the Commissioner did not make decisions on cases where either he or one of his delegates has issued a contempt citation.

6-23 The Task Force recommends that the Act be amended to provide that contempt charges are to be heard by a judge of the Federal Court of Canada.

Compellability of the Information Commissioner

Section 67.1 of the Act introduced in 1999 makes it an offence for anyone, with an intent to deny a right of access under the Act, to destroy, mutilate, alter, falsify or conceal a record or direct, propose, counsel or cause anyone to do so. Should the Information Commissioner and the Commissioner's staff be competent and compellable witnesses in any criminal prosecution under Section 67.1?

The Information Commissioner has recommended that the Act be amended to specify that evidence given to the Commissioner by a witness is inadmissible against the witness in the prosecution of an offence under Section 67.1. We agree.

If the Commissioner concludes in the course of an investigation that there is evidence that an offence may have been committed, he should notify the police authorities, who would then carry out their own investigation. Any prosecution would then proceed on the basis of evidence obtained in the course of the police investigation, not the Commissioner's.

6-24 The Task Force recommends that the Act be amended to clarify that evidence given to the Commissioner or the Commissioner's staff by a witness is inadmissible against the witness in a prosecution under Section 67.1, and that the Information Commissioner and any person working on the Commissioner's behalf are not competent or compellable witnesses in a prosecution under Section 67.1 of the Act.

Review by the Federal Court – Litigating Access to Information

Since Parliament wanted to avoid litigation as much as possible, it selected a two-tiered redress process made up of an ombudsman making recommendations and judicial review before the Federal Court.

Litigation has become more frequent in recent years, but is still relatively rare. Given that litigation is a lengthy and costly process for complainants and for taxpayers, we believe it should remain the exception.

However, not all issues can be solved through negotiation and suasion. There will always be cases where it is appropriate for the Commissioner and for the government to go to court to resolve, in a final manner, honest and often long-standing differences of view on the interpretation and application of the Act. Good case-law can provide a more robust basis for interpreting the Act.

Structural Models for the Review Process

The Information Commissioner, as an ombudsman, has the power to investigate and recommend, but not to decide. Is this the most appropriate model for the future? We will examine three options: retaining the ombudsman model; converting to a model that would give the Information Commissioner order-making powers for process issues; and a model giving the Commissioner full order-making powers.

> [T]he review process should ideally have the attributes of public credibility, consistency with ministerial responsibility, speed, efficiency and minimal cost
>
> Green Paper, 1977

Ombudsman Model

The Information Commissioner is one of five officers of Parliament, three of whom are ombudsmen charged with supervising the administration of an Act[9] and have similar powers.

The ombudsman model, based on inquiry and persuasion, has worked relatively well. It is perceived to be less adversarial and more likely to maintain a positive relationship between the Commissioner and government institutions. It is an economical model for taxpayers and for requesters, with more than 99 per cent of all complaints being resolved without recourse to the courts.

However, because it is a model mostly designed for the case-by-case resolution of disputes, it is less likely to result in the consistent approach and clear rule making that seem to be required now. Moreover, the strengths of the ombudsman model, relying on influence, moral suasion and informality to ensure compliance and effect behavioural change, have been less evident in the last few years.

In our view, the increase in the number of investigations in which the Commissioner's formal investigative powers are engaged is testing the limits of the ombudsman model. To the extent these powers are used, there is, as we noted earlier, a real need for published procedural guidelines and procedural fairness safeguards in the legislation.

Requesters have also noted that the ombudsman model does not necessarily lead to the speedy resolution of complaints. However, given the experience of other jurisdictions, there is no evidence that better timeliness would necessarily be achieved under an order-making model.

With the changes we are suggesting to broaden the Commissioner's mandate and ensure greater procedural fairness, the ombudsman model remains a viable option for the future. On the other hand, it can be argued that there is now a need for the increased coherence, rigour and transparency that are more likely to be achieved in an order-making model. Most of these features can also be built into the ombudsman model and many of our recommendations reflect our efforts to do so.

> The classic ombudsman possesses influence and moral suasion rather than power… Critics of the legislation take aim at the Commissioner's seeming lack of power – his inability to compel release of documents. The virtue of the ombudsman's approach is, however, that it allows for a less adversarial, less legalistic, more informal style. The test of a constructive relationship with government institutions is whether it results in the release of more information than under a régime with the power to enforce orders.
>
> Information Commissioner
> *The Access to Information Act: 10 Years On*, 1994

A Hybrid Model: Order-making Powers in Relation to Process Issues

Another possible model is the one recommended by the 1986 Parliamentary Committee. It would split the powers of the Information Commissioner in two streams. The Commissioner's recommendations would be binding on government institutions with respect to process issues such as format of responses, delays and extensions of time, and fees and fee waivers. However, only the Federal Court would have the power to order the disclosure of records.

There would appear to be some benefits to such a regime. If combined with an expedited investigative process, it would reduce the time taken to resolve complaints on process issues. This is not insignificant as these types of complaints account for over 60 per cent of the caseload of the Commissioner. It would also allow the Commissioner to devote more resources to substantive investigations and to other functions.

Giving the Commissioner power to make binding recommendations may well provide more incentive to departments to respect a negotiated undertaking to respond within a certain time-frame. His binding recommendations would be reviewable by the Federal Court.

However, in our view, expecting the Commissioner – and government institutions – to operate under different sets of assumptions depending on the nature of the complaint could be problematic. This would particularly be the case when a requester complained about both process and disclosure issues in the context of a single request. This model may possibly be useful in a transition toward a full order-making model.

> Adversarialism may be an inevitable consequence of a statutory scheme that puts great weight on "moral suasion" rather than the adjudication of disputes. An adjudicator must carefully restrain his comments on the conduct of government institutions, in order to avoid claims of bias in the application of the law. On the other hand, an ombudsman is free – indeed, expected – to define his function as one of advocating vigorously on behalf of the principle of transparency.
>
> Alasdair Roberts
> *New Strategies For Enforcement of The Access To Information Act*
> Queens Law Journal 647
> January, 2001

Full Order-Making Powers

In this model, the Commissioner would have the power to order the disclosure of records and make orders with respect to administrative issues such as fees, format, and time extensions. In Canada, this is the model in place in British Columbia, Alberta, Ontario and Quebec. Internationally, it is the model in place in, New Zealand and Ireland, and it will be in the United Kingdom, when its Act comes into force.

Our research indicates that in Canadian provinces where a full order-making model is in place, requesters and government officials consider it to be very successful. It was also the model overwhelmingly favoured by those who participated in public consultations or made submissions to the Task Force.

Many users would argue that a Commissioner with order-making powers would provide a more effective avenue of redress for complainants. Under the current system, a complainant who is not satisfied with a recommendation by the Commissioner or the government's response must apply for review by the Federal Court. This is both time-consuming and expensive.

Under the full order-making model, the requester receives a more immediate determination. It is more rules-based and less *ad hoc* than the ombudsman model. Commissioners with order-making powers are tribunals. They issue public decisions, with supporting reasons. This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied. As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness.

The order-making model is also compatible with a high proportion of mediated solutions, as is demonstrated by the experience of the provinces. However it could lead to an increase in litigation, at least in the short term.

It is important to note that most other Westminster-style parliamentary democracies that have a full order-making model have attempted to reconcile it with the principle of ministerial responsibility by providing for a ministerial or a Cabinet override of a Commissioner's order in their legislation.

Our access system has been evolving. There is continued value in resolving disputes through negotiation and suasion. However, we believe the access system is now in need of more clarity in its rules, fairness in its process, consistency in its application, rigour in its analysis, and predictability in its outcomes. An ombudsman model, with the changes we are recommending, could certainly achieve most of these features.

In the final analysis we believe that the structural model in place in most jurisdictions, a quasi-judicial body with order-making powers combined with a strong mediation function, would best achieve this. In our view, it would be the model most conducive to achieving consistent compliance and a robust culture of access. We encourage government to give serious consideration to moving to such a model in the medium-term.

We recognize that the Information Commissioner is just one of a group of federal ombudsmen who operate under legislation which gives them similar powers to investigate and report by way of recommendation. It may, therefore, be appropriate to examine the adequacy of the ombudsman model in access to information as part of a more comprehensive review of these other pieces of legislation as well. In particular, the impact on the powers of the Privacy Commissioner would have to be studied carefully in the context of the interrelationship between the *Access to Information Act* and the *Privacy Act*.

6-25 The Task Force encourages the government to consider moving to an order-making model for the Information Commissioner in the medium-term.

Conclusion

The Task Force believes that the Act should explicitly provide the Information Commissioner with a more extensive range of responsibilities and tools. Investigating complaints is just one way to ensure compliance with the *Access to Information Act*. Procedural safeguards, to ensure that formal investigations are impeccably fair and perceived as such by all involved, will reflect well on the access regime and on the Office of the Commissioner.

The current lack of trust, and the significant differences of perception between the Office of the Information Commissioner and government officials, are mostly reflective of a lack of communication. There is, in our view, room for much more contact that would enhance mutual understanding about the functioning of the investigation process and of the application of the Act, without in any way compromising the independence of the Commissioner or the perception of his impartiality to the public.

Maximize opportunities to build trust – minimize those that destroy trust.

Rick Snell, Australia

Taken together, our recommendations should help to ensure that the purposes of the Act are achieved. They should also help foster organizational learning, a collaborative, mutually respectful relationship between government institutions and the Office of the Information Commissioner, and the promotion of the value of access to information. Both the government institutions and the Information Commissioner will have to work at this.

We recognize that some of our recommendations may require that the Information Commissioner and institutions be given additional resources. These increased costs are not large and they should be at least partly offset by a more efficient independent review process, and a better functioning access system.

---

[1] As of writing this report, there were 29 proceedings before the Federal Court in which 7 distinct procedural issues were being litigated.

[2] This is not currently the case. It is the policy of the Office of the Commissioner that each proposal for settlement be reviewed by the Commissioner. As well, many Coordinators do not have the final authority to agree to a final settlement.

[3] Barbara McIsaac, *The Information Commissioner Investigative Powers and Procedures*, Research Report 28. pp. 28-29.

[4] British Columbia: www.oipc.bc.org; Ontario: www.ipc.on.ca

[5] Supra, note 3. p. 46.

[6] However, some examples provided by Access Coordinators are clearly too deficient in details to be helpful for an institution preparing for an investigation. For example, one notice of complaint read as follows: "Mr. X is complaining about the response received from your Department."

[7] Subpoenas have been served on Deputy Ministers in cases where an undertaking had been given that late requests were to be processed by a certain date but the deadline was not met.

[8] The Information Commissioner notes in his 2000-2001 Annual Report that the significant increase in subpoenas issued that year was largely due to the position taken by the Crown that, with respect to records in Ministers' offices, witnesses would not produce documents or testify voluntarily.

[9] The Information Commissioner, the Privacy Commissioner and the Official Languages Commissioner.

Chapter 7 – The Way to a Better Access Process

Effective access to government information depends on having the right people in place, backed by appropriate systems, structures, policies and support. This chapter will focus on the administration of the access to information regime. More specifically, we will consider what human resources, tools and systems are needed to make the access process work better, and to make it more open.

Most of the suggestions for improving the ATI process involved either human factors or technological solutions.

Report on Consultations
to Review the
Access to Information Act
and its Implementation

Facilitating Access for Canadians

Helping Canadians to Access Information

Technology can be used to assist Canadians in exercising their right of access under the *Access to Information Act*, or to access information through other methods.

The goal of the government's Government-On-Line initiative is to have all major services available to Canadians electronically by 2004. Since Access to Information is a service to Canadians, we are pleased that there is an obvious, easily located link to *Info Source*, the inventory of government information holdings, on the federal government's main Web site (the Canada site at www.canada.gc.ca). However, few Web sites of individual institutions provide easily retrievable and understandable information on their organization, functions and responsibilities and the kinds of records they hold, or have easily understandable instructions on how users can identify records and submit a request to that institution. This should be remedied.

✓

Industry Canada provides an easily identifiable link to an ATIP page in two steps from their home page.

7-1 The Task Force recommends that:

- **the Government of Canada Web site, and those of individual government institutions, include easily retrievable information on submitting requests under the *Access to Information Act*, and on the organization and responsibilities of those institutions; and**
- **this information include descriptions of their programs and functions, the types of records they hold and how their records can be effectively identified.**

Understandably, many requesters do not know how government is organized, or what type of information is held or published by which institution. Section 5 of the Act requires that such information about government institutions be published periodically. *Info Source* is intended to be that publication. The purpose of this inventory of the information holdings of the government institutions subject to the *Act* is to help users determine which institution is likely to have the information they are seeking. However, members of the public find both the terminology used in *Info Source*, and the organization of the information it contains, difficult to understand. The usefulness of *Info Source* would be significantly enhanced if the existing on-line version[1] was more user-friendly, with links to and from the access to information areas of the Web sites of individual institutions. It should also provide clear links to other sites and publications with information about the government, such as the *Sources of Federal Government Information*, and the *Directory of Federal Government Enquiry Points*.

Regularly reviewing and updating an institution's entry in *Info Source* to ensure that the organization and content are up to date and useful.

This kind of revamping would require close collaboration among officials in the communications, access to information and information management areas in each institution, and within the Treasury Board Secretariat, to ensure proper integration with each institution's Web site and with other publications.

7-2 The Task Force recommends that the Treasury Board Secretariat take steps, in conjunction with institutions across government, to make both the hard-copy and Web-based versions of *Info Source* more user-friendly.

Facilitating the Openness of the Access Process

A large percentage of requests made under the *Access to Information Act* are unique; however a significant percentage are similar, or identical to, other requests that have been or will be made. Normally, information that has been released in response to an access to information request is available to any subsequent requester, without a formal request under the Act being required. Information on requests made, and on the records released, could be provided in three ways: through CAIR (the Co-ordination of Access to Information Request system, which lists the requests made under the Act); through summaries of released documents; or through actual copies of released documents.

The Treasury Board Secretariat, in conjunction with Public Works and Government Services Canada, currently manages the CAIR system to capture information on access requests made across the government. However, because many institutions are not contributing to CAIR on a regular basis, the current database is incomplete, and of limited value to the public or for consultations between institutions. The Treasury Board Secretariat should ensure that all institutions have the capacity to upload information from their own request tracking systems to CAIR automatically, and provide incentives for them to do so. A public Web site containing a searchable list of completed access requests would inform users about information that has been previously requested, allow for more extensive research on the use of the Act, and show Canadians how the Act is working.

Government institutions should post on their Web sites summaries of the information they have released that may be of wider interest, as some have started to do. An indicator of wider interest would be multiple requests for the same or similar information. Copies of the documents can then be made readily available on an informal basis to subsequent requesters. Alternatively, the Task Force encourages the creation of "electronic reading rooms" to fulfil this function as technology evolves. Similar to the American E-FOIA requirement to post documents or links to information for which there have been multiple FOIA requests, this would allow individuals to browse the results of access requests over time.

✓

The Department of National Defence posts a listing of responses to ATI requests which may be of interest to others on their web site.

7-3 The Task Force recommends that the Co-ordination of Access to Information Request system (CAIR) be redesigned to make it more user-friendly, and that its component containing information on completed requests across government be made available to the public on a government Web site.

7-4 The Task Force recommends that government institutions be encouraged to post summaries of the information they have released which may be of interest to others, in addition to depositing a hard copy of the documents in their reading rooms.

Facilitating Electronic Request Processing

The Task Force is of the view that the government should develop the ability to process requests electronically, and do so as soon as possible. The United States has legislated a move toward electronic access, and the government could borrow from, and build on, its experience. At present, there are several barriers to receiving and processing requests electronically, including:

- the requirement to verify the requester's status as either a Canadian citizen, permanent resident or someone physically present in Canada;
- the lack in many institutions of a facility for electronic fee payment;
- the lack of electronic records management systems within many institutions;
- the inadequacy of present scanning technology in processing large volumes of records;
- a lack of government-wide standards and software compatibility; and
- issues related to sending third-party notices electronically.

There are fewer barriers with respect to electronic responses. We have noted that some institutions are testing imaging technology, software for the electronic severing of documents, and the practice of providing electronic records to the requester via CD, where files are too large for efficient e-mail transmission. Institutions should share their success stories in this area. As noted in Chapter 2, acceptance of our recommendation to remove the requirement that a requester be a Canadian citizen, permanent resident or physically present in Canada, would remove one of the current barriers to the electronic processing of requests.

The ability to conduct effective electronic searches for records relevant to a request is dependent upon having a reliable electronic documents management system that provides assurance that all existing versions of all records have been found, and that the integrity of the resulting records is protected. Current difficulties relating to the electronic storage of highly sensitive records, and the need for separate, protected servers also pose barriers to improved electronic processing.

Information gathered from other jurisdictions indicates that, at this time, no jurisdiction has a widespread capacity to process electronic applications, accept electronic payments, or respond to requesters by e-mail. Furthermore, except in Ireland, there are no standard government-wide information technology systems to track and manage access requests. Despite this current lack of capacity, every jurisdiction we consulted agreed that being able to receive and respond to requests electronically is a desirable goal.

7-5 The Task Force recommends that the Treasury Board Secretariat investigate ways to encourage initiatives that support electronic processing of requests.

Resourcing the Access Program

Central Resourcing

The expanded mandate of the Information Commissioner, recommended in Chapter 6, would require more resources for that Office. We also believe that the access to information system cannot function properly without adequate resourcing of the central policy and legal advice areas located in the Treasury Board Secretariat and the Department of Justice. In recent years, however, these central bodies have had a reduction in resources. We believe that this lack of resourcing has had a direct negative effect on the access program government-wide.

In order to implement our recommendations and improve the access to information system for Canadians, the government will have to allocate more resources throughout the system. Some of the resources will be short-term, for implementation; however additional resources will be required to support the system on an ongoing basis.

7-6 The Task Force recommends that the government allocate increased resources to:

- **the central policy and legal advice areas of the Treasury Board Secretariat and the Department of Justice;**
- **the Office of the Information Commissioner; and**
- **the access units of institutions.**

Resourcing of Individual Institutions

Effective resourcing of the access program has been difficult for some institutions. From the start, departments have been asked to absorb the costs of access into their existing budgets. The steadily increasing cost of ATI over the last few years has led to a perception among senior management that they have to "steal" from other programs in order to fund an insatiable demand for access. This has led to some resentment. Adequate resourcing is critical to the effectiveness of the access to information system, both in the access units and in the program units that have to retrieve and review records. However, because departmental resources are limited, hard choices have to be made.

Access to information is here to stay, and the government needs to think about budgeting for it in the same way as it does for regular program delivery to Canadians. In other words, it must explicitly identify and plan for resource requirements (skills, technology, money, etc.), monitor trends, measure performance, and identify efficiencies. Government institutions should also consider the implications for access to information when planning a new program, or making revisions to existing ones. Several departments have significantly improved their performance by considering access as a program like any other.

7-7 The Task Force recommends that government institutions manage their Access to Information responsibilities in the same way that they manage other programs, and establish resource planning mechanisms, including resource forecasting, performance measurement and system analysis, as part of their operations.

There are two aspects to planning for ATI workload: meeting normal demand, and responding to unpredictable peaks. With respect to normal demand, the starting point is to establish standards and costing models based on analyses of workload. These analyses would take into account such factors as the number and complexity of requests, the number of informal requests, the number of pages reviewed, and the range of other demands on the access unit (e.g. training activities, providing advice on access issues, consultations with other institutions, etc.). Gathering data to justify resources on the basis of those standards is a must (and we will return to the question of data collection later in our report).

The volume of requests made to an institution can suddenly jump in response to an unforeseen, unpredictable event (such as a plane crash or a diplomatic incident). Responding to peaks in workload will always be a difficult problem for institutions.

Permanently staffing to meet occasional workload peaks is not an option. We believe that creating a centralized pool of qualified ATI staff for temporary deployment across government would not work either. The problems of finding individuals willing to take on such undesirable positions, and of having to prioritize the competing requirements of a number of institutions would make such a scheme impractical. Instead, there is a need to better organize how the government uses contractors from the private sector to deal with peak periods. The government should encourage firms to create pools of qualified individuals with the necessary security clearances, who could be easily hired on contract as necessary to meet unanticipated demands. This would help to ensure that departments are able to obtain qualified temporary staff when they need it, and with a minimum of formality. The Treasury Board Secretariat could play a helpful role in establishing the standard of qualification for consultants and making the process as simple as possible, by working with Public Works and Government Services to establish master standing offer arrangements, for example.

7-8 The Task Force recommends that:

- **Treasury Board Secretariat work with institutions to develop resourcing standards and costing models based on workload analyses; and**
- **the government encourage firms to create pools of qualified individuals who could be hired on contract as necessary to meet unanticipated demands, through such means as master standing offer arrangements.**

Effective Processing of Requests

Responsibility for implementing the Act is given to the "head" of each institution covered by the Act, often the Minister, who may delegate responsibility to officers or employees of the institution. The institution must publish the title and address of the officer in the institution who will receive all requests for access to information made under the Act. This officer, usually known as the Access to Information Coordinator, administers the *Access to Information Act* on a day-to-day basis and normally plays a similar role in relation to the *Privacy Act*. Except in the smaller institutions, Access to Information Coordinators are supported by a unit (of up to 50 or more employees in large organizations, such as the Department of National Defence or the Canada Customs and Revenue

Agency). In smaller institutions, the role of Access Coordinator may be only a small part of one officer's overall responsibilities (e.g. at Farm Credit Canada).

Access Officials

Access to Information Coordinators and their staffs are at the heart of the Canadian access regime and are crucial to the effective processing of requests. The 1986 Parliamentary Committee described them as the prime movers in the implementation of the Act. In managing the ATI process, they perform many functions: consulting with program managers, other countries, institutions, provinces or third parties to identify and assess the sensitivity of relevant records; communicating and negotiating with requesters; conducting reviews of records in order to decide or recommend what records or parts of records should be disclosed or withheld; determining what fee, if any, should be charged; and explaining the institution's position to the Information Commissioner or his investigator during complaint investigations. In addition, they brief senior executives on access issues, provide advice on good practices, promote awareness of access, provide training, and make recommendations to management on improving the performance of their institutions.

Access Coordinators are the lynchpin of the access to information system.

John Reid
Information Commissioner of Canada, Remarks to Conference on Access to Information Reform
May 1, 2001

This challenging, multi-faceted role is often stressful. It requires in-depth knowledge of the institution and of access-related issues, a range of skills and great resiliency. The Task Force met regularly with access officials to better understand the practical challenges they face, and possible solutions. Overall, we were impressed by their commitment to the principles of the Act, their honesty and fairness in assessing the difficulties in the system, and their willingness to help find solutions.

Good officers will get back quickly to a requester, explain what they are doing, how much time it will take and attempt to help the requester zero in on the records they are really seeking.

Task Force Roundtable
with members of the Canadian Association of Journalists
May 27, 2001

While Coordinators work in widely different circumstances and institutions, they all manage the process of receiving and processing requests.[2] Some Coordinators have been delegated all of the authority of the head of the institution to apply extensions to time limits, assess fees, and apply the exemptions contained in the Act to deny access to requested information. In other institutions, the delegation of authority is divided among two or more positions, possibly at different levels of seniority within the institution. In some other institutions, the authority for making final decisions on access has been reserved to senior management, or even to the Deputy Head.

In whatever way the responsibilities under the Act have been delegated, Coordinators have a 'challenge' role to perform when they are consulting with program areas, or outside their institution on particular information and its sensitivity. To do this, they must ensure that all parties understand both the premise of release and the protections contained in the Act, and that everyone in their institution who is involved in making the decision understands the principles of the proper exercise of discretion.

Making Decisions in Response to Requests

Decisions on ATI need to be made quickly and accurately. In order to ensure the quality and efficiency of the institution's decisions, Access Coordinators work closely with officials in the program areas of their institutions. They depend on these officials to identify the relevant records and help them assess the sensitivity of the information and the proper application of the exemptions, all within the time-frames set out in the Act.

> [S]ome ATIA officers routinely prepare impact statements that alert senior officials and communications staff to the anticipated consequences of disclosing information [ ] If it had no impact on the processing of ATIA requests, this kind of tracking might not be objectionable.
>
> Alasdair Roberts
> *Is there a double standard on access to information?*
> *Policy Options*
> May-June 2002

Coordinators also ensure that the communications units of their institutions are aware of any communications requirements, and that they are addressed in a timely way *while* the request is being processed. (It should be understood that the release of information should not be delayed if communications concerns have not been met).

Coordinators, or other officials with delegated authority, are administrative decision-makers when they decide on a right conferred by the Act, so in addition to being made in accordance with the Act, their decision has to be made fairly and without bias. Neither decisions on disclosure nor decisions on the timing of disclosure may be influenced by the identity or profession of the requester, any previous interactions with the requester, or the intended or potential use of the information.[3] This does not mean that Coordinators need to be structurally independent from the institution. They can, and should, consult others in the institution before reaching their decision. However the delegation of authority is structured or whatever decision making process is used, the decision is always made on behalf of the head of the institution.

✓

Alerting the communications unit to requests that will require their attention early in the process so that the communications requirements can be dealt with while the request is being processed.

With the quick responses required under ATI in order to respect the strict statutory deadlines, it is clearly better to have as few levels of approval as possible required for any decision. While there is nothing wrong in having senior managers involved in decision making on access requests, the unfortunate consequence is the additional time usually required to obtain that approval. The effectiveness of the access process in each institution is dependent on decisions being made by the right person at the right level, and in most cases that level is the Access Coordinator, after consulting with the program area manager.

The appropriate delegation of authority is key to a well-functioning access system. While the extent and nature of delegation may vary from institution to institution, in general we believe that the authority to *disclose* records should be delegated as far down the departmental system of authority as possible, even to program area officials responsible for the records. Decisions to *withhold* records, and the authority to apply exemptions, may be more appropriately located in the ATI unit, since whoever makes that decision will have to defend the institution's decision in any investigation.

Effective delegation of authority and responsibility, however, requires trust. With this in mind, we encourage Deputy Heads to recognize the crucial role of the Access Coordinator, and take a direct interest in their selection to ensure that they have the required knowledge, judgment and skills to manage delegated authority effectively. In addition, Deputy Heads must be aware of their responsibility to be available to Coordinators when needed.

Several institutions have audited and successfully re-engineered their access process, including their delegation of authority and their decision-making process. As a result, these institutions have significantly improved their performance under the Act, both in terms of timeliness and in terms of quality of decisions.

✓

Giving authority to disclose information to as many departmental officials as possible, including in program areas and in regional offices.

7-9 The Task Force recommends that every institution examine their decision-making process for factors affecting timeliness and quality, including their delegation of authority under the Act, to ensure that as few approvals as possible are required, and that responsibilities are delegated as far down the organization as possible.

Supporting Access Officials

Roles and Responsibilities

In the course of our work we noted that the role of access officials, though generally recognized as important, is not sufficiently well understood, supported or valued, either within or outside the public service.

We believe there are several steps the Treasury Board Secretariat should take, in conjunction with individual government institutions, to strengthen the role of access officials and help make the public service and general public better understand that role and its strategic nature. These steps could include:

- taking advantage of opportunities (such as Info Source, departmental Web sites and internal government policies and guidelines) to describe the range of roles, duties and delegated responsibilities of Access Coordinators;
- encouraging senior management to invite access officials to regularly take part in meetings to report on ATI issues (referred to in Chapter 10); and
- ensuring that senior management are aware of the the obligations of their Deputy Head under the Act, and the role of access units in supporting him in that role.

✓

Access Coordinators taking the initiative to introduce themselves to new managers in their institution.

Overwhelmingly, access officials rejected the idea that they should report to a single institution such as the Treasury Board Secretariat. They strongly believe that their effectiveness in advising, influencing and educating is dependent on their status as trusted employees of the institution in which they work.

Access officials also forcefully rejected the idea of a specific code of conduct for themselves. In their view, the duty to respect the access law is binding on all public servants, and any code of conduct should therefore apply to the public service as a whole. We agree. There is a need to clarify the roles and responsibilities of heads of institutions, Deputy Heads, program managers and other employees in meeting the statutory obligations under the Act.

7-10 The Task Force recommends that the role, duties and responsibilities of Access to Information Coordinators be described in more detail in the *Access to Information Policy and Guidelines*, in the access policies of individual government institutions, and in information about the access process provided to the general public.

7-11 The Task Force also recommends that the *Access to Information Policy and Guidelines* articulate the roles and responsibilities of heads of institutions, Deputy Heads, program managers and other employees in meeting their statutory obligations under the Act.

✓

Regular reporting to senior management by Access Coordinators, and regular inclusion of Access Coordinators in senior management committee meetings.

The government's *Access to Information Guidelines* currently recommend that the Coordinator be no more than two reporting levels from the Deputy Head. We believe that this is appropriate in order to facilitate two-way communication between the Deputy Head and the Coordinator. However, this is not currently the case in many institutions, and indeed may not always be appropriate. What is critical is that the Coordinator have access to the Deputy Head and senior management when needed, just as internal auditors do. This should be formalized in the *Access to Information Policy*, and in the policies of individual institutions.

In a number of very frank discussions with the Task Force, Coordinators talked about the stress involved in dealing with sensitive files and difficult requests. Coordinators need to be able to count on the support of their Deputy Heads in delicate situations, or to report abuses under the Act, should they encounter any. Deputy Heads, in turn, must be made clearly aware of their responsibility to support their Coordinators and to ensure that their support of the Coordinator is communicated throughout the institution.

7-12 The Task Force recommends that the *Access to Information Policy* require that Coordinators have ready access to the Deputy Head and senior management of their institution.

Access officials need recourse mechanisms available to them should they be asked to endorse the application of an unjustified exemption, or to improperly delay the release of information. We found that there are several such mechanisms that should provide Access Coordinators with effective support. Assistance is always available from each institution's legal services unit and the central access to information policy area of the Treasury Board Secretariat. In combination with the ethics officer positions recently established in departments, the recently promulgated *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (the whistleblowing policy) allows employees to bring forward information concerning wrongdoing, and to ensure that they are treated fairly and protected from reprisal. Finally, the Office of the Information Commissioner is ready to provide advice and assistance, and has done so in the past. Coordinators agreed that these avenues are more than sufficient to guard the integrity of their role.

Access to Expertise and Advice

A recurring theme in our consultations with access officials and requesters was the need for Treasury Board Secretariat to play a stronger leadership role by:

- acting as a clearinghouse for gathering and disseminating best practices in the administration and operation of the Act across government, and encouraging departments to share and adopt best practices;
- increasing its capacity to act as a source of advice and guidance on problematic issues, such as difficult investigations, onerous requests or possible non-compliance with the legislation;
- continuing the practice of issuing ongoing guidelines and interpretation information (this is currently done through Implementation Reports); and
- taking the initiative to create better linkages among its access policy unit, the unit responsible in the Department of Justice for legal advice on ATI, and the broader access community in the government.

Access Coordinators need legal advice on the application of the Act from the Legal Services Units of their institution (DLSU) and from the Information Law and Privacy unit in the Department of Justice, however expertise in the Act is uneven across DLSUs. Those institutions that have a great deal of experience with requests, and possibly with court cases, tend to have good, solid expertise on ATI in their DLSU. In other institutions, the expertise in ATI is lacking, or the responsibility to provide such advice is given to the most junior lawyer in the unit, without adequate training or support. There was a widely reported view that the Department of Justice should enhance its capacity to provide advice to the access community through legal information sessions.

7-13 The Task Force recommends that the Treasury Board Secretariat expand its capacity as the central source of expertise within the government on the operation and administration of the Act, and provide more active support to government institutions, by, for example, providing more advice and guidance to departments on implementation issues, and by gathering and disseminating best practices.

7-14 The Task Force recommends that the Department of Justice enhance its capacity to provide expertise in, and advice on, issues of access to information law to government institutions, as well as to the access community, through the Departmental Legal Services Units and through such avenues as information sessions for access officials.

Training for Access to Information Officials

There is universal recognition that officials responsible for implementation of the Act need high-quality training. While requesters have commented on the uneven skills of access officials, access officials themselves have pointed to the expanded skill set now required for the job. In addition to knowing the organization, programs and culture of their institution, they must have an in-depth understanding of the Act, the regulations, the jurisprudence, policies and processes. They must also have skills in communication, negotiation, problem solving, information management and time management. We support a standard training course in access to information for new analysts, as well as basic training in the other skills required for the job.

Treasury Board Secretariat has made considerable efforts recently to rebuild effective training in ATI. We believe it should play an even stronger leadership role in the area of access to information training by continuing the existing training programs, and by:

- sponsoring the development of a comprehensive common training syllabus for Access to Information Coordinators and their staff;
- making parts of the common syllabus compulsory for different levels of access officials to ensure a high level of competence across government; and
- introducing the use of networks of ATI officials to provide opportunities to share best practices and lessons learned, so as to identify and resolve common issues, and use technology as a tool to support collective learning and networking.

We are pleased that educational institutions such as the University of Alberta are developing programs on access to information/freedom of information, and that this topic is being incorporated into public administration programs at institutions like the University of Victoria. Such programs provide a variety of training opportunities for current public servants, as well as a recruitment ground for future access officials. We believe these types of courses should be encouraged at other educational institutions, and that Treasury Board Secretariat should offer to work with them to develop a full curriculum. Current or aspiring public servants should be encouraged to take advantage of formal access training courses as part of their professional development.

The increased use of electronic systems to create, file and retrieve records has made the access process more technically complex. This complexity has highlighted the need for Access Coordinators and their staffs at all levels to be equipped with the information technology knowledge and skills to operate effectively in an advanced electronic environment.

7-15 The Task Force recommends that:

- **Treasury Board Secretariat take the lead in developing enhanced training and learning opportunities for access to information officials;**
- **access officials be required to complete the parts of the training appropriate to their level of responsibility;**
- **information technology training be included in the compulsory training for access officials;**
- **Treasury Board Secretariat support training in access to information by educational institutions across Canada; and**
- **access officials be provided with regular opportunities, through learning networks, to share information and best practices with their counterparts in other institutions.**

Careers in Access

Dedicated, qualified, motivated access professionals are crucial to the effective provision of access to information. Attracting and retaining skilled staff is now a significant challenge for ATI units as the demand for qualified employees far exceeds the supply. This situation will worsen as experienced access officials retire, move to other positions, or leave the public service. This has unfortunately led to a practice of access units "poaching" staff from each other, and the overuse of contractors in some departments. While the use of contractors is appropriate when needed to meet unplanned demand or temporary staffing shortages, it cannot be a long-term strategy or a viable approach to the day-to-day delivery of the access program.

Recruitment, retention and succession planning are now an urgent necessity, and must be addressed on a government-wide basis. Among the successful measures that some institutions are using to bring people into the access community is the creation of developmental positions, or internships, in access units. Through such positions they recruit staff to the access unit from other parts of the institution or from outside the public service, applying a philosophy of "growing our own" through on-the-job staff development.

The issues of recruitment and retention of experienced staff must be addressed government-wide because there is a general difficulty finding and attracting qualified personnel.

Summary of General Consultation with Government Institutions

There are several initiatives that could help make working in ATI an attractive career choice:

- enhancing career mobility by classifying access officials within a broader grouping of professionals with related skills and impact (for example, in some institutions, access units are located with the compliance and rights-based processes, while in others they are with strategic areas such as planning, communications or executive services, or with information management officials);
- standardizing statements of qualifications for ATIP Coordinator positions, as well as for other access staff positions, along with suggested tools to assess the qualifications; and
- reviewing classification standards within the access to information community, examining and rationalizing the levels of Access to Information Coordinator, analyst and staff positions across the government.

✓

Giving employees from throughout the institution rotational assignments in the ATI unit.

7-16 The Task Force recommends that the Treasury Board Secretariat:

- **consider including access to information positions in classification groupings with other related disciplines;**
- **assess the appropriateness of classification levels of ATI positions across the government; and**
- **develop standardized statements of qualifications for ATI positions, along with tools to help institutions determine the qualifications needed for particular positions.**

Tools

Better use of current and emerging information technology could greatly improve the efficiency of the access process. Some departments have made progress in using software (such as ATIPflow) to track requests, using scanning hardware and software to convert paper documents into digital form, using e-mail for receipt of requests, and using the Internet to post summaries of responses to requests. This progress has, however, been uneven.

Some institutions do not yet use automated tracking systems. This means that their systems for keeping track of access requests are less efficient, and that their requests are excluded from the government-wide CAIR electronic database. This in turn hinders their involvement in interdepartmental consultations, and excludes their data from the government-wide aggregate of statistics on access requests (which earlier in this chapter we suggested be made public).

7-17 The Task Force recommends that the Treasury Board Secretariat encourage the use of, and consider providing smaller institutions with, request-tracking software.

Conclusion

Access officials need broader support and recognition from within their institutions, as well as from the government's policy and legal advice centres. Expanded training, updated tools and effective resourcing could produce significant improvements throughout the system.

Technology could help increase public awareness of the Act, as well as facilitate its use by a growing number of Canadians.

While these changes will require some additional resources, they will be a worthwhile investment in the relationship between Canadians and their government.

---

[1] The on-line version of *Info Source* may be found at: http://infosource.gc.ca

[2] In some institutions, the position of Coordinator is held by a senior official who fulfils that role as a portion of his or her duties. These Coordinators are often known as "titular Coordinators", as they do not perform the day-to-day functions of a Coordinator, although they may hold the delegated authority to make decisions on access. In institutions with titular Coordinators there is also a "functional Coordinator" who is responsible for the day-to-day functions of the access unit, and for providing expertise to management and the institution, although he or she does not have decision-making authority. In many institutions, the titular Coordinator and the functional Coordinator are the same person. When we use the term "Coordinators" we are generally referring to those people with responsibility for the day-to-day functions of the access unit.

[3] In a recently published article ("Is there a double standard on access to information?"; *Policy Options*; May-June 2002), Professor Alasdair Roberts describes a study of 2,120 requests handled by Human Resources Development Canada in 1999-2001 and suggests that there is a pattern that requests of media and political parties take longer to process. Although it is difficult to draw conclusions from a small sample of requests from one institution, such a finding serves to emphasize that, while there is nothing inherently wrong with ensuring that senior management and communications units are informed about the impending disclosure of information that could raise questions for the institution, such activities should not be allowed to add to the time taken to respond to the request. The identity or profession of the requester should not affect either the timing of the response or the content of the information released.

Chapter 8 – Meeting the Information Needs of Canadians Outside the Access to Information Act

Canadians will continue to want more and more information about how government works, as well as more involvement in government policy and decision-making. This is good news since democracies are better served when citizens are informed, interested and engaged in public life. However, the *Access to Information Act* cannot meet all of these needs for information, nor was it intended to.

As Section 2 of the Act makes clear, the Act:

> ...is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

This provision is central to the Act's vision of access to information.

In the future, the needs of our "information smart" society will increasingly pressure government to put as much information as possible in the public domain, through a variety of channels.

Of course there will still be a need for a legislated right of access in order to provide Canadians with information where the public interest in disclosure and protection must be balanced. But looking at the provision of information to Canadians in its broadest context, we recognize that the formal access procedures set out in the Act have some inherent limitations:

- first, they are time-consuming and require a lot of resources;
- second, they are generally not an effective way of providing information in an understandable context; many requesters may be better served by accessing the information on government Web sites, where the information can be displayed for easy access, provided in a context, and organized with links to related material; and
- third, the ATI process is rarely effective for research purposes that require "systematic access to groupings of government records as a coherent, intricately related and frequently indivisible body of documents."[1]

In our consultations, participants unanimously agreed that more government information should be routinely released through channels outside the Act.

> [T]he government has some responsibility to ensure that the citizenry and the population have access to this information required for optimal learning and governing. This is all the more important since the state is the largest repository of information in society and often the only source of some unique data of great relevance for understanding our contemporary social and natural environment, and therefore needed for meaningful political participation by the citizenry.
>
> Luc Juillet, Gilles Paquet
> Research Report 1

> While the Act has served well in enshrining the right to know, it has also come to express a single-request, often confrontational approach to providing information – an approach which is too slow and cumbersome for an information society.
>
> Information Commissioner
> *Annual Report 2000-2001*

We believe there should be several elements of a comprehensive strategy for the provision of government information in addition to the *Access to Information Act* process: proactive dissemination, passive dissemination through virtual reading rooms and libraries, informal release, and special disclosure mechanisms for research and bulk review of classified records.

8-1 The Task Force recommends that all of the ways that information can be provided to the public (including access under the Act) should be considered during the design and implementation phases of any new program or activity of the government.

✓

Consulting the access to information unit for advice on the ways that information from a new program or activity can be provided to the public.

In Chapter 7, we discussed how technology can be better used to help Canadians exercise their rights under the Act. We believe that providing access to government information in other ways is an important service to Canadians that should be better integrated into the Government-on-Line (GOL) initiative, which is developing systems for providing government services to Canadians electronically. Canada has recently been praised as an international leader in this area, and the government should take advantage of this achievement to enhance its methods for providing information to Canadians.

In the previous chapter, we recommended improvements to the information on the Government of Canada Web site about making requests under the Act. We also believe that the site should provide clearer directions for the public on the variety of ways for accessing information held by government institutions.

> One approach ... is to devise and rigorously implement a government-wide system for routine disclosure of information without access requests having to be made. A principled argument for doing this, of course, is that it promotes openness and accountability. But it can also be an effective response to the scarcity of resources and the ensuing delays experienced in many jurisdictions, since it would obviate resort to the potentially costly and time-consuming processes inherent in any modern access law.
>
> David Loukidelis,
> British Columbia Information and Privacy Commissioner
> FOIP 2000 Conference –
> Edmonton, Alberta: May 29, 2000

8-2 The Task Force recommends that the Government of Canada Web site provide an explanation of the different ways that government information can be accessed.

Proactive Dissemination

A lot of government information of interest and concern to Canadians – such as information relating to health, jobs, taxes and consumer interests – is made public through news releases, government Web sites, formal publication programs and other means. Departments could do more to identify the kinds of information that are of interest to the public by regularly and systematically analyzing requests made to them under the *Access to Information Act*, as well as by looking closely at informal requests for information, and at comments and questions received through their Web sites and in correspondence. Once identified, this information could be regularly provided in the normal course of business.

Proactive dissemination gives the public the best general access to information. While it is best used for information where there is a broad, continuing public interest and the information is not considered to be sensitive, it also requires significant time and resources. The information distributed must comply with government standards for posting material, the rules for publishing government information, and the provisions of the *Official Languages Act*. To try to distribute the large volume of information held by the government proactively would therefore not be possible, or indeed, useful.

✓

Yearly analysis of request subject matter to determine what information could be made available proactively.

Formal publication is intended to make government information available to the widest possible audience. The National Library's list of publications and the Depository Services Program run by Public Works and Government Services Canada ensure that government publications are available wherever there is a library.

> Journalists also said that more types of information should be released through more channels. They specifically mentioned the following:
>
> i. Information concerning the how and why of government policy and planning; the rationales for Bills going through the House
>
> ii. Information concerning the options being weighed by government before a decision is taken or policy implemented
>
> iii. Discussion papers and background material; policy papers.
>
> Paul Attallah, Heather Pyman
> Research Report 8

We recognize that not all government information can be distributed by the government directly; the cost would be prohibitive. That is why a number of private enterprises collect, organize and resell information from all levels of government that would not otherwise be generally distributed to the public.

Partnering with the private sector allows government-held information to be made more widely available to Canadians than would otherwise be the case. We believe that this approach should not be used to replace publication by a government institution where there is a need to inform the general public; however, it may be highly appropriate for those categories of government information for which there is a limited, but identifiable, market (e.g. scientific and technical research papers). The government role in these partnerships should be to ensure that the information is sufficiently widely available to interested Canadians and that issues such as pricing, accessible format and official languages are addressed.

8-3 The Task Force recommends that government institutions more systematically identify information that is of interest to the public and develop the means to disseminate it proactively. These means should include regular publication, and the use of Web sites, or special arrangements or partnerships with the private sector, where appropriate.

✓

When the Department of the Environment became aware of the growing number of requests for information on the mercury levels in fish, it made fish consumption advisories available on its Web site.

Passive Dissemination – Libraries and Virtual Reading Rooms

Throughout the vast stores of government records, there is some information which is not of interest to the general public, but is of interest to specialized audiences. Institutions should find a method of providing access to that information in an efficient, convenient and realistic manner. Often a strategy of passive dissemination is the most appropriate. By this we mean that the title or summary of the record is included in a searchable index or catalogue, which an interested individual may examine in a public location, either in person or on-line. Individuals may then receive copies of those records which are of interest to them without having to make a request under the Act. Technology now allows institutions to post the indices or lists of available records in a "virtual reading room" on their Web site, and to provide access to electronic records on request.

Subsection 71(1) of the Act requires government institutions to provide a facility where the public may inspect manuals used by the institution's employees. Institutions may have lists of records that have been disclosed under the Act available in the same facility (or on-line).[2] A similar approach can be used for other types of non-sensitive information. For example, departments regularly receive requests for information about new standing offers, and many institutions already use passive dissemination to make that information available by depositing it in the departmental library or reading room.

Departments that regularly receive requests for information on new standing offers deposit the information in the departmental library or reading room, rather than treating them as requests under the *Access to Information Act*.

As with proactive dissemination, analyzing ATI and other information requests can help departments identify material of interest to smaller or more specific groups of users, which would be suitable for passive dissemination through actual or virtual libraries and reading rooms. Ideally, users would have the tools available to identify the information they want to consult on a Web site, or in a library. We recognize that issues relating to publication in both official languages would have to be resolved for this approach to have a widespread application.

> [R]outine extensive disclosure is also meant to ensure social learning and effective governance in the new information society. More than an accountability requirement, it derives from a proper understanding of the value of information as a public good and as an essential resource for the creation of value in the knowledge economy as well as to provide the requisite amount of information for the citizen to perform his governance functions... [A] wide access to government information is also a pre-requisite for better-adapted and more successful public policies.
>
> Luc Juillet, Gilles Paquet
> Research Report 1

8-4 The Task Force recommends that, where there is an identified need or interest, and where the information is not sensitive, government institutions make as much information as possible available to the public either in hard copy or electronically.

Informal Release

The public should have easy access to any material which presents a low risk of containing sensitive information requiring protection under the *Access to Information Act* or the *Privacy Act*. Such information should be routinely and informally released, either by the program staff or by the ATI unit, but public servants need better guidance on what they can disclose. A deterrent to the informal release of information has been public servants' fear of inappropriately disclosing information. This problem could be resolved if departments established formal protocols authorizing the informal release of information, and identified records appropriate for such release. Such a step would help ease employees' concerns and encourage a healthy practice of routine disclosure of non-sensitive information to the public.

8-5 The Task Force recommends that government institutions:

- **routinely release information, without recourse to the Act, whenever the material is low-risk in terms of requiring protection from disclosure; and**
- **establish protocols for use in identifying information appropriate for informal disclosure.**

The proportion of access requests being handled informally has been decreasing, from 5.7% in 1995-96 to 1.9% in 2000-2001.

To fully inform Parliament and Canadians about the ways that information is being provided to the public, a full description of the informal disclosure and proactive and passive dissemination practices of institutions should be included in the institutions' annual access reports to Parliament and on their Web sites.

✓

Health Canada's initiative to make information on adverse drug reactions available on an informal basis.

8-6 The Task Force recommends that government institutions describe their informal disclosure and proactive and passive dissemination practices in their annual reports to Parliament under the *Access to Information Act* and on their Web sites.

Special Disclosure Mechanisms for Research Purposes

To help encourage systematic research and scholarship, several government institutions have established mechanisms outside the Act to give researchers more efficient access to coherent and significant blocks of records in specific areas of research interest. Examples include arrangements relating to research on aboriginal land claims at Indian and Northern Affairs Canada; on Canadian foreign policy at the Department of Foreign Affairs and International Trade; on defence policy at the Department of National Defence; on government decisions and Cabinet documents at the Privy Council Office; and on a wide range of subjects in historical documents at the National Archives. These mechanisms usually have conditions attached. They require researchers to have a security clearance, for example, or recognized researcher status, or to sign an agreement not to disclose protected information, such as personal information or confidences of another government. The advantages of this system for researchers are low charges, less cumbersome access procedures, and access to a vast, coherent set of records without having to wait for the government department in question to complete a line-by-line review.

The Access mechanism [is perceived] not as an aid to scholarship, but, because of the time involved, the uncertain outcome, and sometimes the costs involved, as a real deterrent.

Wesley Wark
Research Report 20

[A]bout 90% of access requests from aboriginal peoples' researchers are now dealt with "informally" under the guidelines set out in "Native Claims Research – Guidelines for Informal Access to Records".

H. Foster, C. Parker, M. Rankin
and M. Stevenson
Research Report 21

8-7 The Task Force recommends that, where there is an ongoing, regular demand for access from researchers, government institutions establish processes outside the *Access to Information Act*, building on the examples already established in several departments.

Systematic 30-Year Bulk Review

The Task Force repeatedly heard from stakeholders, particularly historians, that some records relating to Canada's modern history are now more difficult to obtain than before the *Access to Information Act* and the *Privacy Act* were passed. They identified two factors that contribute to this situation. The first is that some exemptions have no time limit, and are therefore seen as "eternal". The second is that the line-by-line review of records required under the Act takes a lot of time and resources, and thus cannot be done on a large scale. These stakeholders recommended that the "30-year rule" that preceded the Act be reinstated. That rule required that all government records be released 30 years after their creation (unless they fell into one of the categories that did not have to be released). Three submissions from the public recommended that such a "passage of time" clause be incorporated into the Act.

The Task Force agrees that records should not be "eternally" exempted from disclosure, and that a mechanism is needed to trigger the release of records that are no longer sensitive. In examining this issue, however, we concluded that a rule requiring the automatic release of government records after any specific time period would not yield the desired results. For example, some exemptions include criteria for assessing probable harm, which should enable records to be released well before the 30 years is up. In such cases, the insertion of a 30-year rule in the Act might well result in later release than is now the case.

As well, certain other exemptions are designed to protect information that can be sensitive for a much longer period of time. In these situations, the release of the information could still harm national interests or individuals, even after 30 years.

Regardless of how much time has passed, issues relating to national security, defence, international relations, criminal investigations, law enforcement, trade secrets, personal information, information obtained in confidence from other jurisdictions, and statutory prohibitions, must be considered before specific information can be released from these categories. On the other hand, it is in the public interest that an effective mechanism be established to facilitate as much disclosure as possible of older records whose original sensitivity has diminished. The aim would be to encourage broad-based research and the generation of coherent public knowledge. Such a mechanism would take into account that some of the exemptions would have to continue to apply for very long periods of time.

As time goes by, the archival record constitutes the government's corporate memory – a memory we inherited, we add to, and pass along to future generations.

Ian Wilson
National Archivist of Canada,
You Must Remember This
Presented to a Roundtable Series
convened by the Institute on
Governance, March 1999

The Access Act purported to open up material more recent than 30 years but it imposed a series of conditions, including national security and federal-provincial relations. At the time we were told that nothing already opened would be closed, but that assurance proved to be false.

Submission to the Task Force

The Access Act has had the effect of bringing to a complete standstill any systematic process of declassification and release of historic records in the field of security and intelligence.

Wesley Wark
Research Report 20

Because of the high volume of historical records involved in research, the cost of page-by-page review would be unsustainable. We therefore believe it is necessary to move to a process of bulk, high-volume review and release of historical records. Decisions on the release of such records should be based on an understanding of both the larger historical context of events and "educated" risk management. This means that departmental experts on that subject would need to be brought into the process of the "high-volume" review. The Department of Foreign Affairs and International Trade uses retired foreign service officers in a similar fashion for ATI requests. Such practices should be considered for the high-volume review of records for declassification. In some circumstances it may be appropriate for researchers to pay the contract costs of such officers brought in to work solely on the declassification of records of interest to the researcher. The review itself would involve an overall assessment of the files in systematic blocks, applying suitable sampling methodologies.[3]

✓

In the U.S. Department of State, retired Foreign Service officers are hired on contract to review records for declassification and for *Freedom of Information Act* purposes. These individuals have the corporate memory necessary to understand the context of the information, and their employment via contract allows for flexibility in the number of resources and subject-matter expertise required at any given time.

We recognize that information acquired by the government as a result of national or international co-operative initiatives may require bilateral or multilateral consultation before it can be released.

At what point should bulk review occur? The choice of a time period for applying such a process is, of course, somewhat arbitrary. Canada could maintain the tradition of the 30-year standard, which would be in line with the U.K. model, or apply the 25-year time period now used in the U.S., and being considered in France. Whatever time period is selected, it will be important to ensure that it is not wrongly interpreted as the minimum time limit for the protection of records.

✓

The process used by the NATO International Staff for declassifying records appears to work well, as it has resulted in the release of a great number of records.

In our view, the National Archives is best placed to play the lead role across government in developing and adopting processes for the systematic bulk review and release of historical records. This role would include both the records under their care, and the limited number of records over 30 years old that remain with the originating government departments.

Any mechanism for bulk review of records, no matter how efficient, will clearly require more resources than are currently available. We believe the results will be well worth it.

8-8 The Task Force recommends that the National Archives play the lead role in developing and adopting processes for the systematic bulk review and release of historical records.

Conclusion

The *Access to Information Act* cannot meet all of the information needs of Canadians, nor was it meant to. Government institutions should be encouraged to adopt strategies that promote the maximum disclosure of government-held information outside the Act. Adopting a comprehensive strategy for providing government information to the public, and using the existing strength in electronic communications to deliver more information, as we recommend in this chapter, would increase the amount of useful information available to Canadians. This would enhance their understanding of how the country functions, and the pressure on the Access to Information system would be significantly reduced.

---

[1] Wesley Wark, *The Access to Information Act and the Security and Intelligence Community in Canada*, Research Report 20.

[2] A more detailed discussion of this issue may be found in Chapter 7.

[3] These "sampling methodologies" would mean that, depending on the subject matter of the records, a number of files would be selected from each file category for a detailed review in order to assess the likelihood of the presence of information which should remain classified for a longer period.

Chapter 9 – Addressing the Information Management Deficit

The government's ability to provide information to Canadians – by whatever means – cannot improve unless its information is properly managed. This means that records must be created, classified and filed for easy retrieval, and reviewed for appropriate disposal or archiving on a timely basis. Good management of information is essential for creating and maintaining reliable records that support good decision making, program and service delivery, accountability, legal processes and the preservation of our national memory.

This point has been reiterated by the Information Commissioner, the National Archivist, numerous participants in our consultations, both public servants and users, and the authors of several of the public submissions we received. Everyone is in agreement, however, that there is a crisis in information management in the federal government, as well as in every jurisdiction we have studied. The reasons for the problem are strikingly similar.

> The whole scheme of the *Access to Information Act* depends on records being created, properly indexed and filed, readily retrievable, appropriately archived and carefully assessed before destruction to ensure that valuable information is not lost.
>
> Information Commissioner
> Annual Report 1999-2000

How did we get here?

We believe that there are several contributing factors:

- as a result of the automated workplace, the amount of information being generated has significantly increased, especially in electronic formats;
- the shift from paper-based to electronic records systems is a significant challenge, and often results in poorer management of paper records, even before a system for managing electronic records has been developed;
- in the 1990s, information management and documentation activities came to be seen as administrative overhead, and were often the first areas to be cut when budgets were reduced;
- with the proliferation of personal computers, individual public servants are expected to manage the information they create or acquire, without this responsibility being clearly communicated to them, or adequate training or support provided; and
- reduction of resources has led to a reduction of central leadership: Treasury Board Secretariat has delegated more responsibilities to departments and agencies, and the Secretariat and the National Archives have drastically reduced government-wide information management monitoring, training and guidance.

These factors have led to a significant deficit in information management in the federal government.

The "information management deficit" in government is seriously hindering the ability of government institutions to provide proper access to the records under their control. In general, paper records are no longer well organized, and an effective approach to the management of electronic records is not yet available. The Canadian Historical Association, the Association of Canadian Archivists, the Canadian Library Association and the Professional Institute of the Public Service of Canada all advocated urgent action in this area – both to improve current access, and to ensure the long-term preservation of, and access to, valuable historical records. Public servants have themselves observed that they lack the support, training, guidance and tools they need if they are to be expected to document their activities properly, and manage the records they create or control.

Problems in information management exist now and always have. From this study, it does not seem that the promulgation of the ATIA in 1983 had an impact on the way records were created and managed.

National Archives of Canada
Research Report 9

Some people believe that the adoption of the *Access to Information Act* itself contributed to the decline of information management because it caused public servants to become hesitant to record information. The evidence at this point, however, does not support this view. A study conducted by the National Archives in 2000[1] on a representative sample of records created before and after the Act came into force, found no evidence that the Act had an impact on record creation and management. The study found that other factors, such as those we have already cited, were more likely to have had a significant impact. A study conducted by the Information Commissioner of Ireland in 2001 came to much the same conclusion. Since several of the factors which have contributed to the decline in records management have occurred almost simultaneously, it would be difficult to prove conclusively that the Act either has or has not had a significant impact on the decline of records management over the last twenty years. Nervous public servants have probably thought about access when they decided not to write something down, but more often the issue may have been a lack of training in the principles of information management or even in the practical aspects of proper records management in an electronic environment.

An Information Management Strategy

Information management in the federal government is currently governed by several information laws and policies. These include the *National Archives of Canada Act*, the *National Library Act*, the *Access to Information Act*, the *Privacy Act*, the Policy on the Management of Government Information Holdings, the Government Security Policy, and the Government Communications Policy, as well as the policies on access to information and privacy and data protection. For the most part, public servants are not aware of these laws and policies, which are the responsibility of different institutions.

The Treasury Board Secretariat and the National Archives are already working together on solutions to several information management issues. The joint Treasury Board/National Archives report, *Information Management in the Government of Canada, a Situation Analysis* (June 2000), made extensive recommendations for revamping and strengthening the government's records management regime. The revised *Management of Government Information Policy* will soon be completed, and an "*Information Management Framework*"[2] has recently been issued to provide comprehensive guidance to public servants in managing information. There is also recognition of the need to rebuild a community of information management experts in government.

> Information is an integral part of government business delivery and cornerstone of government accountability. It must be managed as a strategic business resource from the earliest point in the business planning cycle through solution development, implementation, day-to-day business operations and assessments.
>
> *Framework for the Management of Information in the Government of Canada.*
> Treasury Board Secretariat, 2002

Clearly these are all steps in the right direction. However the government still lacks a government-wide strategy of policies, standards, practices, systems and people to support information management in the coming years. We believe that such a coherent, government-wide approach to the challenge of information management is urgently required to provide direction and co-ordination among the institutions with primary information management responsibilities, including the National Archives, the Treasury Board Secretariat, and the National Library. It should also establish effective mechanisms for these agencies' collaboration to ensure that information management issues are handled comprehensively.

An integrated information management strategy will, of necessity, focus primarily on building for the future world of electronic record-keeping. However, we believe that immediate short-term action is also needed to address the effects of the information management deficit of the last decade. For example, partnerships between the National Archives and individual government institutions could help institutions bring the basic management of government information (including e-mail) to an acceptable level. A great help to public servants – who must now function as their own electronic file clerks – could be the development and implementation of schemes linking each institution's records classification structure to its business processes (as opposed to the records classification structure based on subject which is now used). Similar partnerships between institutions and the National Library could assist institutions in ensuring the preservation and accessibility of their publications (including Web site postings) for the future, through mechanisms such as the Depository Services Program. These kinds of efforts will assist government institutions to better manage their existing records, and to effect the transition from paper to electronic records.

> If information is not managed and protected well enough it can lead to administrative inefficiency, reduced accountability; legal, financial and political liability; and the erosion of public confidence in government.
>
> Ian Wilson
> National Archivist of Canada
> *Technology and the Citizen: The Role of Archives: Information Highways 2000 Conference.* March 2000

9-1 The Task Force recommends that:

- **a co-ordinated government-wide strategy be developed to address the crisis in information management;**
- **a short-term plan be developed to deal with the most immediately critical needs and a longer-term plan to build ability and structure for the future; and**
- **this strategy provide for partnerships among the agencies with primary responsibility for information management (Treasury Board Secretariat, the National Archives and the National Library) and other government institutions.**

Security Classification and Information Management

All information management systems incorporate security classification schemes for records. Since the existing *Government Security Policy* was developed at the same time as the *Access to Information Act*, deliberate care was taken to ensure that the provisions relating to the security classification of records mirrored the exemption and exclusion provisions of the Act. It was expected that public servants would consider the security of records when they created them, and that they would indicate the type of information in the record to be protected and how long the protection was expected to be required. It is clear from our discussions within the public service that, except for those who work in areas that regularly deal with the most sensitive information, few public servants have a clear understanding of records security classification, and even fewer understand the connection with the *Access to Information Act*. This results in an erratic and often inaccurate security classification of records.

> Early identification of records suitable for release is crucial to the wider provision of access, particularly in the case of electronic records [ ] While it is recognised that not all access decisions can be made at the point of creation, identifying metadata can help to group records into categories to assist decision making at a later date.
>
> Australian Law Reform Commission Report 85

The review of records for disclosure, whether under the Act or through other avenues such as the bulk review of historical records, would be easier if authors were to routinely (and accurately) indicate the classification or designation of the record. This should include the type of information contained in the record that would likely result in the application of an exemption or exclusion under the Act (e.g. personal information, confidences of another government), and the period for which the record should be protected. They would be assisted in this if electronic records management systems were developed with the security classification as a mandatory field for every record, and guidance on the proper application of the security classification was included in the "Help" section of the software.

Usually no one is in a better position to determine the proper security classification of a document than its author, as long as they have adequate training and assistance. Those processing the records for disclosure should be able to rely on the authors' assessments as an indication of whether review is required, and what type of sensitive information may be contained in the record. This is particularly true for the vast majority of government records which are unclassified, for which no protection is required, and to which access could be freely given.

The need for protection can, however, change dramatically over time. For example, information that is highly sensitive when a record is created, may not be sensitive by the time a request is made. Consequently, the status of a record should be reassessed at the time it is requested, even if it has previously been evaluated. Any markings placed on a record at the time it is created; for example "protected", should not be considered determinative of the status of a record for ATI purposes.

The efficiency of the mechanisms we discussed in Chapter 8 for providing greater access to information outside the Act is largely dependent on the reliable classification of records by their authors. In order to expect authors to appropriately classify the records they create, they must be trained in information management, in the provisions of the *Access to Information Act* and in the application of the *Government Security Policy*.

9-2 The Task Force recommends that:

- **training on the safeguarding, classification and designation of information in accordance with the *Government Security Policy* be incorporated into an integrated training package that would cover information management and Access to Information;**
- **security classification be included in electronic records management systems; and**
- **public service managers ensure good practices in their units with respect to the classification of records and the realistic assessment of the sensitivity of information.**

Accountability for Information Management

There is currently no accountability regime for information management that is as effective as the regimes in place for financial and human resources management. Without such a regime, it is hard to see how the needed changes in information management – extending to the level of individual employees – can be implemented effectively. Central agencies must supply the tools and guidance to support effective information management. At the same time, individual government institutions must assume responsibility for management of the information they hold, just as they now do for the management of their other key resources.

Within individual institutions, Deputy Heads and their equivalents need to be clearly accountable for information management and for its monitoring in their organizations. This accountability should be reflected in the

All persons working for the [Government of Canada] use information in the conduct of their duties and have a responsibility and obligations for managing information.

Framework for the Management of Information in the Government of Canada
Treasury Board Secretariat 2002

accountability accords of senior managers and in performance agreements of all managers. In order to oversee this activity, managers will require appropriate audit and evaluation tools, which should be developed as part of the government's overall information management strategy.

For the government as a whole, a framework should be in place to permit regular monitoring of the effectiveness of information management. Government-wide monitoring should be the responsibility of the National Archives, in partnership with the Treasury Board Secretariat and the National Library.

> Institutions should be in a position to demonstrate that a complete search for records has been conducted.
>
> John Reid
> Information Commissioner
> Presentation to the External
> Advisory Committee
> June 2001

9-3 The Task Force recommends that:

- **an effective accountability regime for information management, including the necessary audit and evaluation tools, be established and implemented within government institutions; and**
- **a reinvigorated, government-wide framework for monitoring information management be established and implemented by the National Archives, in partnership with the Treasury Board Secretariat and the National Library.**

Support for Public Servants

It has become very clear to the Task Force that public servants are uncertain about when and how to document what they do, when to classify records, and how to manage and properly dispose of records. Effective access to information and good records management depend on public servants having a clear understanding of what is required of them.

It is critical that all public servants be aware of their responsibility for information management, from the creation of records through to their ultimate disposition; and that they receive training in the use of the information management tools that will help them to fulfil their responsibilities.

The Task Force believes that the proper documentation of activities is an important feature of a professional public service. Within an overall, centrally established Information Management Framework, government departments should establish specific documentation standards for their own activities, based on an analysis of what they need in order to conduct their business.

Individual public servants should be aware that they have a duty to create and manage records of policy decisions and operational activities, to classify records for security and filing purposes, and to dispose of records properly at the end of their operational usefulness, including the transfer of historically important records to the National Archives.

> [T]he many valid public policy reasons for creating and keeping records are sometimes ignored or difficult to implement. Government internal communications have become increasingly casual, aided by the growing ease and convenience of electronic mail, voice mail, fax and similar tools. Some key decisions and directions are conveyed orally with no record of the transaction.
>
> Ian Wilson,
> National Archivist of Canada
> 3rd Annual ATIP Conference
> Ottawa, November 2001

The explosion of e-mail communications presents a particular problem. As in every other jurisdiction we have talked to, many public servants are uncertain and concerned about the management of e-mail, and particularly worried about its disposal. Public servants need to be made aware that most of the e-mail messages they send and receive are subject to the *Access to Information Act*, the *Privacy Act* and the *National Archives of Canada Act*, and should be managed and disposed of in the same way as any other government records. In comparison to other types of government records, however, a higher proportion of e-mail messages are likely to be transitory records.

Transitory records are defined by the National Archives as: "records that are required only for a limited time to ensure the completion of a routine action or the preparation of a subsequent record [and] do not include records required by government institutions or Ministers to control, support or document the delivery of programs, to carry out operations, to make decisions or to account for activities of government." Transitory records may be disposed of once they are no longer useful for the purpose for which they were created (unless they are the subject of a request under the *Access to Information Act*). For example, a telephone message slip may be thrown in the garbage once the call has been returned, or handwritten notes of a meeting may be destroyed once necessary information has been transcribed and added to the relevant file.

The rules for proper disposition of records have been a concern for public servants, particularly since the addition in 1999 of Section 67.1 to the Act which made it an offence to destroy records in order to obstruct the right of access under the Act. What needs to be clarified is that the ongoing disposal of transitory records is a healthy records management practice. It allows for better, more efficient information management and processing of requests for access to information. The routine destruction of transitory records, within a well-structured records management program, should not give rise to an alleged offence under Section 67.1.

Providing public servants with the knowledge and skills they need to become effective stewards of public information will require a deliberate effort. As renewed policies, frameworks and guidelines become available, they should be communicated directly to every public servant.

All employees should receive ongoing training and guidance. For new employees who join the public service, a significant element in their initial orientation and training should be the basics of information management, combined with a briefing on access to information principles.

To help consolidate the learning provided through orientation and training, the Treasury Board Secretariat should provide all employees with a brief practical guide to the key elements of information law, policies and standards.

✓

The Government of Ontario provides its employees with a mouse pad highlighting practical information management guidelines.

Support to public servants should also be available from a cadre of information management specialists who would form a centre of excellence on information management. They would have responsibility for ongoing research into standards and best practices. This group should form the core of the government's information management expertise, available to every department and agency.

In addition to standards, awareness, training and guidance, public servants must be given practical, easy-to-use tools that will facilitate their management of information. While steps have been taken toward the development and implementation of electronic records management systems in several departments, there is further work to be done to make these systems fully reliable, user-friendly, comprehensive (including e-mails and non-text records, for example), supportive of all of the information management functions (including retrieval, disposal and security classification), and integrated with the paper-based records systems.

9-4 The Task Force recommends that:

- **standards be established for the documentation of the business of government;**
- **orientation and training, and ongoing guidance in information management, be available for all employees;**
- **a user-friendly, authoritative, practical guide be developed to assist public servants in creating, managing and disposing of their records; and**
- **a central area of expertise in information management be established, with responsibility for keeping the government's Information Management Framework up to date through research into standards and best practices.**

Some of these recommendations will no doubt require substantial resources, both initially and on an ongoing basis. Government departments and central agencies alike have lost a large part of their information management capacity, so they will need significant resources in order to address the situation. We believe that the information management infrastructure cannot be allowed to erode further. Expenditures on improving information management are a strategic investment. The return will be improved program and service delivery, better government information, and better access to that information for Canadians.

Conclusion

Good information management is a precondition to good access to information. Information management in the federal government is in need of serious attention. A government-wide information management strategy is required, building on recent work by the Treasury Board Secretariat and the National Archives, and with supporting monitoring and accountability regimes. Public servants need to be made aware of their responsibilities for the creation, management and disposal of information, and provided with the knowledge, skills and tools necessary to carry out those responsibilities. A significant investment of resources will be required, both to address the current information management deficit, and to implement longer-term strategies.

---

[1] National Archives of Canada, *The Access to Information Act and Record-Keeping in the Federal Government*, 2001, Research Report 9

[2] *Framework for the Management of Information in the Government of Canada* (FMI) can be found at http://www.cio-dpi.gc.ca/im-gi/fmi-cgi/fmi-cgi_e.asp .

Chapter 10 – Measuring and Reporting on Performance

No access to information regime can be improved without an understanding of how it is currently operating. This chapter considers what data and other information institutions should collect on how their systems are working. What information is needed in order to effectively administer the Act, and to monitor, assess and report on its performance to Canadians?

Calculating and publishing the performance statistics – and asking departments to explain unusual trends – is an excellent way to promote accountability.

Alasdair Roberts,
Measuring Openness,
Media Magazine
Fall 1999

Annual Reports to Parliament

There are currently three series of public annual reports that deal with the Act's implementation:

- As required by Section 72 of the Act, each government institution prepares an annual report on its administration of the Act. This is tabled in Parliament and referred to the Standing Committee on Justice and Human Rights. These reports include statistical information on the volume of requests, their disposition, the exemptions invoked, the exclusions cited, the completion times and the extensions taken. They also provide statistics on the number of translations required, the method of access, the fees collected or waived, and the costs involved. Most reports include a brief analysis of the year's ATI activities. A few institutions now include brief discussions of the sources of requests, the number and type of complaints to the Information Commissioner, as well as the number of requests for consultations, and of informal requests.
- In accordance with a recommendation of the 1986 Parliamentary Committee, the President of the Treasury Board also prepares and tables in Parliament an aggregate report of the statistics from these annual reports of individual institutions.
- As required by Section 38 of the Act, the Information Commissioner submits an annual report to Parliament on the activities of his Office. The Commissioner traditionally takes advantage of this opportunity to report on government institutions' performance in responding to access requests. This report is also used to highlight any legal or other issues that have been a priority during the reporting year. In addition, it includes the Commissioner's suggestions for administrative or legislative improvements.

✓

ATI units providing senior management with regular status reports on the access system, including any current or forecast problems or pressures.

Management Information

Senior management throughout government are provided with reports on the performance of programs within their institutions in order to assess their success and to identify and deal effectively with problems. This should be the same for the administration of the Act. Senior management should regularly receive data for monitoring the ATI program in their institution.

Some institutions – usually the larger departments with higher volumes of requests and thus more experience – have made progress in establishing reporting structures to inform their senior management of the volume and types of requests received and any difficulties encountered in processing them. The frequency of these reports, the nature of the information they provide, and the level of management that receives them, all vary widely from one institution to another.

In some institutions, the only time that senior management is involved in the access program is when there is a particularly sensitive file or difficult investigation. This can lead them to form inaccurate conclusions on how well the access program normally works in their institution, as well as on how the situation could be improved. The Task Force observed that those departments with the best reports to their senior management also tended to have better information in their annual reports and better processes, as well as better resources, greater visibility and higher credibility within their institutions.

An Analysis of Current Performance Information

An analysis carried out for the Task Force identified several weaknesses in current reporting:[1]

- None of the public reports individually – or, indeed, grouped as a whole – provides a complete, balanced picture of ATI performance across the government. In most cases, institutions' individual reports present statistical data, with relatively little analysis. This is mirrored in the aggregate report prepared by the Treasury Board Secretariat.
- As the Information Commissioner's primary role is to investigate complaints, this perspective is naturally the one reflected in his annual reports.
- There are weaknesses in the data being collected by government institutions, by the Treasury Board Secretariat and by the Information Commissioner. In general, the statistics appear to be accurate in themselves; however, they do not indicate the complexity of requests, the quality of responses, or the efforts institutions make to release information outside the Act. Nor do they identify the cause and extent of problems to be addressed, any trends in requests, or any information that would help management to plan or to pinpoint performance issues and possibilities for correcting them.

In short, the information being collected by most government institutions does not tell the whole story or even a useful story. Nor is it very helpful in identifying what is being done well, and what needs to be done to improve implementation of the Act.

Accommodating a Variety of Performance Reporting Needs

In the view of the Task Force, there is a need for performance reporting that accommodates the information needs of government institutions, the Treasury Board Secretariat and the Information Commissioner, and that provides relevant information to Parliament. Although each of these institutions may have different requirements for data, there should be agreement on the fundamental principles involved. This would help all parties better understand the progress, challenges and failings of the ATI system. The information should also facilitate monitoring and continual improvement of the system in individual departments and across the government, and generate data that can be used over time for longitudinal analyses. These analyses could then support periodic reviews of the Act and its administration, as suggested in Chapter 12.

Do the statistics now in the public domain tell an adequate story on the access performance of government/your department? When asked this question, all interviewees answered "no."

Goss Gilroy
Research Report 29

In previous chapters, we discussed the need for institutions to review and re-engineer the way they deliver ATI, and consider ATI as a program. Supporting this should be methods to gather the data needed for two purposes:

- to manage the access program, including identifying priorities and demand trends, and focusing on possible problematic areas; and
- to assess government institutions' performance in meeting their obligations under the Act.

Improved Assessment of Access Activities

The research undertaken for the Task Force identified several activities, beyond the usual processing of requests, that government institutions undertake to effectively implement, monitor and manage their access systems:

- monitoring and analyzing requests for information to help understand the demands made of the institution and how these are changing (this would require appropriate databases and information systems, as well as research and analysis of emerging trends in demands);
- developing strategies for responding to demands, with strategic priorities set at both the institutional level and for the government as a whole, and resources reallocated as necessary;
- implementing strategies, including the redesign of practices and procedures; recruitment, development and training of staff; and provision of information to the public about their rights under the Act; and

- assessing strategies and approaches for dealing with demands for information: to include identification and assessment of problems with existing strategies and approaches; surveys of requesters about the service they received; and reports on institutions' performance and that of the government as a whole.

Implementation of an effective performance model will require improved data, analysis and reporting. The improved data (e.g. on the complexity of requests, timeliness, resources used, and client satisfaction), would allow for improved analysis, particularly of trends in requests for information, and problems with responses at both the individual institution and government levels. Improved reporting, by individual institutions, by the Treasury Board Secretariat for the government as a whole, and by the Information Commissioner, would provide a much more useful basis for assessing the system. These improvements would all require consistent definitions and tracking of data across institutions in order to facilitate government-wide analysis.

The federal access-to-information system can be criticized on many grounds, but on one dimension it is clearly unparalleled. Federal departments and agencies have deployed better software systems for tracking information requests than any other jurisdiction in the world.

Alasdair Roberts,
Is there a double standard on access to information?
Policy Options
May-June 2002

Access officials reported that the most pressing need is for a measure of the complexity of requests. Such a measure would likely incorporate factors for the volume of the records retrieved and reviewed, the number of locations having relevant records, and the ease or difficulty of retrieving the records, the time-frame covered by the request, the number of other government, third party or other institution consultations required, the variety of exemptions applied, and the variety of formats of relevant records.

10-1 The Task Force recommends that the Treasury Board Secretariat, working with the Office of the Information Commissioner, develop several common performance measurement indicators, giving priority to a measure of the complexity of requests.

10-2 The Task Force recommends that institutions develop performance measurement indicators to help them identify those areas of their institutions that are having difficulty, or systemic problems affecting their institution that senior management could address.

[T]he section 72 reports have simply gathered dust. That's unfortunate, because the data contained in these reports can be useful in tracking how individual departments deal with FOI requests.

Alasdair Roberts
Measuring Openness.
Media Magazine
Fall 1999

This improved data and reporting would have several benefits. It would generate the data needed to support institutional and system-wide improvements. It would give both Treasury Board Secretariat and Parliamentarians the kind of information they need to play an active role in monitoring ATI activities. It would help encourage pride in departments that are performing well. It would give Canadians a realistic and dynamic picture of how the ATI system is working. And finally, it would support future research in this area.

10-3 The Task Force recommends that institutions' annual reports to Parliament be expanded to include:

- **information on strategies to provide information outside the Act;**
- **initiatives undertaken to improve the access to information system;**
- **issues arising during the year that significantly affected the institution's Access to Information program; and**
- **planned improvements to respond to identified problems or trends.**

10-4 The Task Force also recommends that the Treasury Board Secretariat's annual aggregate report provide a much broader view of how the system is working across government, and include analysis of trends on key issues.

Conclusion

The data currently being collected on the performance of the access to information system do not give a complete picture of its strengths and weaknesses, nor do they provide information that could be useful in identifying ways to improve the system. The development and tracking of a standard set of performance indicators would be useful to everyone interested in measuring how well the government and the institutions are administering the *Access to Information Act*. It would support an enhanced role for Parliament, as well as increased accountability and continuous improvements of the system.

---

[1] Goss Gilroy Inc., *A New Reporting Framework for Assessing the Performance of the Access to Information Program*, Research Report 29.

Chapter 11 – Creating a Culture of Access to Government Information

In previous chapters we concluded that the *Access to Information Act* was basically sound but in need of modernization in some areas. We also made a number of recommendations to improve administrative practices and tools. However, these measures by themselves will not be enough to ensure that the objectives of the law are achieved. They must be supported by a strong "access" culture within the government, encompassing both access under the Act and the provision of information to Canadians through other means.

> No matter how well crafted an access law may be, it will only be a good law if public officials make it work.
>
> Information Commissioner
> Annual Report 2000-2001

In this chapter, we will look at how a strong access to information culture can be achieved through training, tools, awareness, values, leadership and incentives.

There is no piece of legislation which is as directly tied to the work of each and every one of the approximately 200,000 federal employees as is the *Access to Information Act*. Public servants create, collect, assess, approve, organize, store, file, search, retrieve, review and release government information. There can be no significant and lasting improvement of access to information without their understanding, co-operation and support. Prescriptive legislation and coercive measures are useful for defining rights and deterring non-compliance. They are less effective, however, in encouraging public servants to act, day in and day out, in ways that further the objectives of the Act. This should be the ultimate goal.

> Openness cannot be legislated. Culture is the key.
>
> Officials, Australia

A Cultural Change

Officials in many jurisdictions told us that a common mistake they made in implementing their access regime was failing to assess the extent of the cultural change involved. The same can be said of Canada.

Since the Act came into force in 1983, debate has centred largely on the design of exemptions, interpretation of the various provisions, and denouncing instances of non-compliance. Government efforts have focused mainly on publishing implementation guidelines, recruiting and training access officers and putting in place processes and systems needed to handle a growing volume of requests and meet legislated deadlines. Neither at the time the Act came into force, nor since, has there been a comprehensive strategy to raise awareness of, and support for, access to information in the federal public service.

> On reflection, the single critical factor overlooked by us when approaching FOI was that it was a change process, not just a legislative matter.
>
> Gerry Kerny, Aine Stapelton
> Government of Ireland

This is not to say that the public sector culture has not changed as a result of access to information legislation. It undoubtedly has. Public servants have learned to live with the everyday reality of access to information, albeit not always comfortably. More importantly, in all of our consultations with public servants, there was universal support for the principles of access despite widespread frustration with the practicalities of implementation. This support is a solid foundation on which to build.

Many observers are critical of the slow progress made in changing attitudes and behaviours in the public service after almost 20 years of legislated access to information. This is understandable. However, values change very slowly. Compared with long-standing public service values such as the pursuit of the public interest, neutrality, loyalty to the government, and respect for ministerial responsibility, access is a relatively new value. It has yet to be fully integrated with the older values.

We believe that more attention must be given to embedding access to information into the organizational culture and values of the public service; that is, into its mind-set and its everyday work routines.

How is a culture of access created?

In discussion groups conducted as part of our research, we asked public servants to identify the factors that support or detract from the effective provision of access. They were very clear. As supporting factors, they listed good information management, efficient filing systems, proper training, leadership, proactive release policies that reduce the need for formal requests under the Act, clearly articulated requests, adequate resources, and having access to information identified as a priority by senior management. The negative factors included lack of clear direction and policies, substandard filing systems, insufficient resources, inadequate tools, frivolous requests, competing priorities (e.g. needing to juggle access work with other duties), having access to information considered an "add-on," and not part of the "real job," and receiving mixed messages on access from leaders.

These factors correspond to the two elements that are common to all organizational cultures: a material element (tools, systems and resources to do the job) and an "ideational" element (the ideas, symbols, values, norms and beliefs that shape perspective and behaviour).[1] To construct and maintain an organizational culture of access, attention should be paid to both.

The Tools to Do the Job

Our consultations within the public service made it clear that the tools, systems and resources public servants now have available to them are not adequate to administer the Act as it should be. As we discussed in Chapter 9, the key problems relate to information management. These are compounded by the increased use of electronic records, and the lack of a shared understanding of what should be documented or filed. This not only makes access work more laborious and frustrating than it should be, it also gives public servants the impression that it is not important, because the government does not invest in facilitating the work.

Providing public servants with the resources and the tools required to do access work efficiently is not a luxury. It is an absolute prerequisite to organizational cultural change. We have made a number of recommendations in earlier chapters of our report on how this might be achieved.

Fundamental Values of the Public Service

Culture comprises, among other things, core values, beliefs and symbols shared by members of a group over time.[2] The public service is an old institution with strong values. Any successful cultural shift should build on the most meaningful aspects of the public service culture, such as respect for democracy, service to the public, and professional excellence. These cornerstone values,[3] of particular relevance for access, resonate deeply with the public service.

> [I]n the heart of most public servants lies the conviction that service to the public, [ ], to the public interest, is what makes their profession like no other. It is why they chose it, for the most part, and why they keep at it, with enthusiasm and conviction, despite difficulties and frustrations along the way.
>
> *A Strong Foundation*
> *Report of the Task Force on*
> *Ethics and Values*
> *in the Canadian Public*
> *Service*, 2000

- There is a need to stress the democratic importance of access to information as it supports the transparency and the accountability of governments, and allows for a more informed dialogue between government and citizens.
- Public servants are motivated by a deep sense of service to the public. Stewardship of government information on behalf of all Canadians, and the provision of information to the public through a variety of mechanisms, should be understood to be an integral part of the service role of public servants.
- Professional excellence in documenting government activities and managing information should be part of the standards of the public service and a source of pride.

Admittedly, retrieving and processing records in response to access requests is time-consuming, resource-intensive, tedious, unpredictable, disruptive of work plans, and it can result in uncomfortable publicity. It is, therefore, all the more important that this work be seen to be supportive of, and grounded in, the core values of the public service. For this reason, the Task Force believes that information management, and the provision of access to that information, must be more closely linked with public service principles and more actively promoted in the public service.

> From our end ATI is looked on as a pain but a necessary pain. There is no question that the people have a right to these documents.
>
> Participant – Public Service
> Discussion Group

In the fall of 2001, the Clerk of the Privy Council announced an initiative to develop a Statement of Principles of the Public Service of Canada. At the time of writing this report, the draft principles referred to: serving the public trust and the public interest; operating within a framework of rights and responsibilities; a commitment to parliamentary democracy; excellence and efficiency in service delivery; and serving Canadians with honesty and openness. All of these principles are highly relevant to access to information. We believe that the promotion of the value of access to information will also positively enhance these values and principles.

> Instead of seeing the *Access to Information Act* as an obstacle to their work, public servants should see it as an integral role in fulfilling their mandate as public servants.
>
> Canadian Library Association
> Submission to the Task Force

11-1 The Task Force recommends that:

- **the Statement of Principles of the Public Service of Canada refer to the responsibilities of public servants as stewards of government information and as providers of access to that information; and**
- **training modules for public servants, including orientation sessions for new employees and courses for managers, stress the linkages between access to information and core public service values.**

Awareness and Training for Public Servants

It is a truism that people do not comply with rules that they do not know or understand. In our consultations with various public service communities, the Task Force found a generally low awareness of the principles set out in the *Access to Information Act*, significant misconceptions about how the Act is meant to operate, and a gap between existing work practices and what would be required to enable the Act to be implemented effectively.

In Chapter 7, we discussed enhanced professional training for access officials. However, providing education on access to information, at all levels in government institutions, may be even more important to improve performance. Every manager and employee must be made aware of his or her responsibilities in relation to both information management and access to that information, as the two go hand-in-hand. While training and awareness are not a panacea, the Task Force has concluded that they are key to improving attitudes and skills with respect to access.

The federal government should establish orientation and training programs to raise the awareness of all public servants of their responsibilities for government information under the ATI Act and related government policies and guidelines, and to increase the skills of public servants in access to information management.

Open Government Canada
Submission to the Task Force

Awareness of access and information management should be part of the orientation training that all employees receive on joining the public service.

All employees who are involved in any aspect of processing access requests should receive training tailored to the specific needs of their institution. Modules on access to information should also be integrated into management training offered both within individual institutions, and on a government-wide basis. This will require the involvement of the Treasury Board Secretariat and agencies providing training, such as the Canadian Centre for Management Development, as well as individual government institutions and their ATI offices.

To promote a positive perception of access, this training should not just focus on the legal and process aspects. It should emphasize as well, the role of public servants, the underlying principles of access, and highlight best practices and success stories.

✓

The Canadian Security Intelligence Service has prepared a useful publication for its employees to assist them in understanding both the *Access to Information Act* and the *Privacy Act*, and their impact on the work of the institution.

11-2 The Task Force recommends that:

- **awareness of access to information and information management be part of orientation programs for new public servants;**
- **generic training modules on access to information be developed for the training of program staff, in a form that can readily be customized to meet the needs of individual government institutions; and**
- **all managers receive access to information training, including the efficient management of access requests from a program perspective and best practices in managing information and in creating a culture of access.**

> [Access work] needs to be legitimized as "real work", valued work and rewarded work.
>
> Gladys Symons
> Research Report 10

Embedding Access in the Worklife – Incentives and Accountability

Our research concluded that one of the greatest obstacles to establishing a culture of access in the public service is the invisibility of much of the work, and the perception that this work is of little value.[4]

For access to become part of the organizational culture, it needs to be recognized by managers as a legitimate aspect of their staffs' work, on the same footing as their other duties. It should be organized and rewarded in the same manner. As regular work, it should be routinized in day-to-day work processes and activities, and reflected in job descriptions and in performance reviews. It should be discussed in management meetings and reflected in the organization and resourcing of new programs, and in corporate plans. Several institutions have taken steps such as these to provide visibility, positive incentives, and accountability for access. These practices should be encouraged across the public service.

> When we recruit, we gild the lily, describing the great job and responsibilities. We sell the nice part of the job but we don't talk about ATI. It's not really mentioned in the job description.
>
> Participant – Public Service
> Discussion Groups

11-3 The Task Force recommends that:

- **responsibilities related to access to information and information management be included in the job description of officers and managers;**
- **objectives related to access to information and information management be part of the accountability agreement and performance reviews of all managers;**
- **government institutions discuss their performance on access to information on a regular basis at management meetings;**
- **when new programs are established, an access to information component be included from the outset as an integral part of the program; and**
- **access to information goals be integrated in annual corporate plans for government institutions.**

> In a pressure-driven system of competing activities, there are almost no rewards for program managers for giving priority to finding and then reviewing responsive records.
>
> David Flaherty
> Research Report 25

Serving Ministers

Public servants are accountable to Ministers and through them to the Canadian people. In practice, there may be a perceived conflict between supporting a Minister and providing information that could have political repercussions. This issue is best addressed directly.

It needs to be clear to everyone that public servants only serve Ministers according to the law. Inconvenience or embarrassment to a Minister or a particular government institution is not a valid reason to withhold information or delay release. We believe that early training of staff in Ministers' offices about the Minister's obligations under the Act, the process in place in the institution for handling requests, and good records management, would improve the performance of institutions and facilitate a culture of access to information.

We recognize that Ministers have legitimate concerns and needs related to the release of information. These needs must be addressed by institutions in ways that do not interfere with compliance with the Act. Here is how one Minister directed his department on access:

> *I expect that impending release of sensitive information will be brought to my attention in a timely manner so that I may respond to questions. This requirement however should not in any way contribute to delays in responding to access requests. Responding to the request for information from citizens in a timely manner is essential not only because of the requirements of the access legislation, but also to enhance the opinion Canadian citizens have of this institution and to promote the Department's objective of transparency.*[5]

This kind of clear, unambiguous statement by the Minister of what is expected of departmental staff goes a long way toward legitimizing a culture of access in an institution. It is a model to emulate.

11-4 The Task Force recommends that:

- **Deputy Ministers brief Ministers on their responsibility for implementing the Act;**
- **Deputy Ministers assist Ministers in making their support for access and their expectations for compliance clear to the government institutions for which they are responsible; and**
- **staff in Ministers' offices receive access to information and records management training soon after their appointment.**

Management Support

Public service employees and managers at all levels agree that support from management is essential if a culture of access is to be created and maintained in the public service. Management needs to reinforce the principles and purposes of access and support their employees in complying with the Act. Management sets the tone.

Senior managers need to give the right signal to their staff by:

- ensuring that access to information and information management are included in orientation/training courses for their staff;
- actively monitoring compliance with the Act;
- adequately resourcing access to information work in both the program areas and in the ATI office of their institution;
- exercising appropriate discretion in making disclosure decisions; and
- fostering in their organization a sense of pride in responsible disclosure, and the provision of government information through a variety of mechanisms.

> The senior management cadre must realize that the attitude its members express towards access rages like a grassfire through a department.
>
> Information Commissioner
> Annual Report 2000-2001

Providing Corporate Leadership

There is also a need for leadership across government. This role belongs to the Treasury Board Secretariat.

The leadership role we recommend for the Treasury Board Secretariat includes strengthening its role as a centre of excellence and expertise in access to information, in collaboration with the Department of Justice. It encompasses improving access to information and information management policies and guidelines, and giving them a higher profile across government. It implies as well, an active part in encouraging a general culture of information management, and routine provision of government information to Canadians.

> The formula is simple: to create a broad culture of access, employees must be encouraged by their superiors to generate and maintain it.
>
> Gladys Symons
> Research Report 10

> There is an overwhelming need for government champions of freedom of information laws.
>
> Ann Cavoukian
> Ontario Information and
> Privacy Commissioner
> Submission to the Task Force

11-5 The Task Force recommends that the Treasury Board Secretariat strengthen its role as the centre of excellence for access to information in the government and as access "champion" for the government as a whole.

Signalling Change and Fostering Key Attitudes

We believe that a few simple messages consistently promoted in the public service could significantly improve attitudes and performance with respect to access to information.

- Public servants are stewards of government information on behalf of Canadians.

- Providing information to Canadians is an integral part of the role of public servants.
- Public servants create records of the Government of Canada, most of which could be made available to Canadians.

11-6 The Task Force recommends that the training of public servants emphasize that they are stewards of government information on behalf of Canadians; that the provision of information is an integral part of their job; and that the records they create in the course of their work are records of the Government of Canada, and for the most part can be made public.

Deliberate and sustained efforts need to be made to promote the value of access to information as part of the principles of the public service.

The Task Force was impressed by the Open Sweden campaign,[6] the Swedish government's initiative launched in 2000 to increase openness within the public sector and to enhance awareness of access to information in the public. This initiative to review the commitment to access, and to strengthen the understanding and practices of the public service, is all the more impressive since Sweden, with a tradition of access to information more than two centuries old, has arguably one of the most open public service cultures in the world.

We believe that an awareness and training campaign should be considered in Canada to support the legislative and administrative reforms we are recommending.

Another aspect of the Swedish public service culture that impressed us was its obvious pride in openness that forms part of its identity. Instilling pride in federal public servants for openness, and making it a strong part of their identity, might well be the single most important improvement to the performance of the access to information regime.

11-7 The Task Force recommends that, in conjunction with its response to our recommendations, the government launch a broad campaign in the public service to enhance awareness of access to information, appreciation of its principles and pride in providing information to Canadians.

Conclusion

Public service understanding of, and support for, access principles are crucial to create and sustain a culture of access. Just as critical is to ensure that public servants have the tools, the training, and time, to do access work. Access to information needs to be valued and recognized within the public service, supported by managers and Ministers, integrated into day-to-day practices, and reflected in accountability and reward systems.

Over the next several years, thousands of new employees will be recruited into the ranks of the public service. This unprecedented recruitment provides a unique opportunity to embed the principles of access to information into the values of the public service of the future. There should be a deliberate effort to do so.

We hope that, with the implementation of the recommendations in this chapter, providing access to information will become an integral and valued part of every public servant's job, and that excellence in information management and transparency will be a matter of pride for the Canadian public service.

We also hope that greater disclosure of government information will lead to better public understanding of the breadth, complexity and value of the work performed by the public service on behalf of all Canadians, as well as to a productive public debate about choices and challenges for Canadian society.

---

[1] Gladys Symons, *Constructing a Culture of Access in the Federal Public Service*, Research Report 10.

[2] Ibid.

[3] A Strong Foundation, Report on Ethics and Values in the Canadian Public Service, 2000.

[4] Supra, note 1.

[5] Letter from the Minister of National Defence to his Deputy Minister, April 6, 1999.

[6] The Open Sweden Campaign, www.oppnasverige.gov.se
The "Open Sweden Campaign" sets out a number of criteria for civil servants and citizens to ensure knowledge of access to information principles. The criteria for full and effective application of the principles of access to information are:

- that managers and civil servants are accessible, generous in providing information and have good knowledge of the regulations;
- that information is easy to find and written in a clear and easy-to-read language; and
- that workplace organization and routines support easy access of information.

The criteria for public knowledge and awareness of the right of information are:

- that citizens understand the meaning of the Principle of Public Access to Information;
- that citizens know how to obtain public information in various situations.

Chapter 12 – Last Word: Enhanced Dialogue on Access to Information

It has now been 20 years since the Act was passed and 15 years since it was last reviewed. This long gap in formal study of the Act has *contributed to diminished* confidence in the legislation and some misapprehensions about how access to information operates.

While we have concluded that the Act is basically sound, we have made recommendations to modernize it to keep it current with the new realities of governance, technology and the evolving aspirations of Canadians. Moreover, we have recommended numerous changes in the practices and culture of government institutions.

Adjustments and improvements will need to be made again in the future. Regular reviews of the Act and of its operation are required to ensure it continues to provide the best balance in the public interest, and that access practices and systems deliver the outcomes envisaged by Parliament.

> The achievement of transparency is an ongoing process more than a revolution. It should not be a partisan debate but a common effort toward better democracy [Translation]
>
> Alain Dubuc
> La Presse, 2000

We have found that reviews are more frequent in other jurisdictions and they take many forms: reviews of the legislation by legislatures, administrative reviews by public servants, and reviews by joint committees with public servants and users. Some of these reviews are comprehensive. Some focus on a single aspect of access to information, such as the impact of information technology. We believe that the review of the federal legislation, practices and systems should be both more regular and less confrontational.

> [T]he situation in Canada appears to be one in which debate over the Act, over exclusions and exemptions, and over where the line should be drawn, is the subject of ongoing, open and free debate. The line may shift from time to time and the very fact that the line is open to debate, and that citizens feel free to debate it, is itself a sign of openness.
>
> Paul Attalah, Heather Pyman
> Research Report 8

We have a good Act and the basic systems are in place. What we lack is a structure to support continuous learning and progress.

More opportunities for access to information officials and requesters to meet and exchange views, such as conferences, would be beneficial. In some jurisdictions, ongoing advisory committees of stakeholders and access officials have been quite successful in improving practices, and generating useful proposals for legislative reform. We believe that such a committee could yield similar good results in Canada.

Academic research in this field should be encouraged to deepen our understanding of the issues.

The public debate in recent years around access to information has been highly adversarial. For all the vivid metaphors and quotable quotes, this debate has failed to generate system-wide progress, learning, or significant attitude changes.

Ultimately, leadership responsibility rests with Parliament in its many roles and dimensions.

Information Commissioner
Annual Report 2000-2001

We need opportunities for reasoned dialogue on access to information among public servants, politicians and citizens. We believe that sustained and informed attention by Parliament would be highly beneficial to support informed choices and long-term change. This could be achieved not only through periodic parliamentary reviews but, more importantly, by ongoing scrutiny by Parliament of annual reports tabled by the Information Commissioner, the President of the Treasury Board and government institutions.

Our recommendations in Chapter 10 for better information on the strengths, weaknesses of the access system would allow for this kind of effective oversight by Parliament.

12-1 The Task Force recommends that:

- **the Treasury Board Secretariat consider setting up an advisory committee of stakeholders and access officials to provide ongoing advice on the administration of the Act;**
- **a full review of the Act and its operation be conducted every 5 to 10 years; this could be done either by reviewing the Act as a whole, or by looking regularly at specific areas of legislation and practice; and**
- **there be enhanced ongoing Parliamentary oversight of the access to information regime.**

List of Recommendations

---

1. Starting with the Basics: Access Principles and the Right of Access

Access Principles and the Purpose Clause

1-1 The Task Force recommends that:

- the access principles currently set out in the purpose clause in Section 2 of the Act remain unchanged; and
- Treasury Board Secretariat and the Information Commissioner ensure that access principles are better communicated to the general public and to public servants.

Right of Access

1-2 The Task Force recommends that, following further discussions with those departments most likely to be affected about the impact on costs and how to manage any increase in requests that may result, the Act be amended to provide that *any person* has a right of access to records under the control of a government institution.

---

2. Revisiting Coverage: Government Institutions

The Executive

2-1 The Task Force recommends that:

- the Act be amended to set out criteria to be taken into account in determining what institutions should be covered under the Act;
- the criteria provide that institutions may be covered if
  - government appoints a majority of board members, provides all of the financing through appropriations, or owns a controlling interest, or
  - the institution performs functions in an area of federal jurisdiction with respect to health and safety, the environment, or economic security;
  - except where coverage would be incompatible with the organization's structure or mandate.

2-2 The Task Force recommends that:

- a comprehensive review of existing alternative service delivery organizations be undertaken to determine whether they meet the criteria; and
- the Act only be extended to existing organizations that meet the criteria following a reasonable period of time to prepare their new access to information regime.

2-3 The Task Force recommends that the Act not apply to information relating to critical interests of organizations already covered or to be covered by the Act (e.g. journalistic sources, competitive commercial activities), where the current exemptions would not adequately protect such information.

2-4 **The Task Force recommends that the government's *Policy on Alternative Service Delivery* and *Policy Guide* be amended:**

- **to include the criteria for coverage under the Act, along with guiding principles, in order to ensure a full analysis of the issue of coverage when new alternative service delivery organizations are created; and**
- **to provide that where coverage under the Act is not appropriate, an alternate and comprehensive disclosure regime be put in place.**

The Legislature

Parliament

2-5 **The Task Force recommends that:**

- **the Act apply to the House of Commons, the Senate and the Library of Parliament;**
- **the Act exclude information protected by parliamentary privilege, political parties' records and the personal, political and constituency records of individual Senators and Members of the House of Commons; and**
- **Parliament consider whether the appropriate second tier of the redress process is judicial review following a complaint investigation by the Information Commissioner, or some type of review by Parliament itself. For example, a panel of experienced parliamentarians could be appointed to review situations where the Commissioner recommends disclosure but the House of Commons, the Senate or the Library of Parliament maintains the information requested is protected by parliamentary privilege.**

Officers of Parliament

2-6 **The Task Force recommends that:**

- **the Act apply to the Offices of the Auditor General, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner;**
- **the Act exclude records relating to the exercise of a parliamentary officer's audit or investigation functions, or other government institutions' records under the custody of a parliamentary officer strictly for the purposes of an audit or investigation; and**
- **the *Canada Elections Act* be amended to provide for access to information about the administration of the Office of the Chief Electoral Officer, and a mechanism to resolve any related disputes.**

2-7 **The Task Force recommends that the Act provide for the designation of a retired judge to investigate access to information complaints against the Office of the Information Commissioner.**

The Courts and the Judiciary

2-8 **The Task Force recommends that the courts and related institutions not be subject to the Act, but that they adopt alternate and comprehensive disclosure regimes to ensure as much transparency as possible with respect to their administration.**

3. Looking at Scope: Records covered by the Act

Definition of a Record

3-1 The Task Force recommends that the definition of "record" in the Act remain unchanged since it is already comprehensive, but its meaning be better communicated to public servants.

Under the Control of a Government Institution

3-2 The Task Force recommends that the *Access to Information Guidelines* be amended to provide more detailed guidance on the meaning of the expression "under the control."

Contractors' Records Related to the Delivery of Government Programs and Services

3-3 The Task Force recommends that the government's *Policy on Alternative Service Delivery* be amended to ensure that arrangements for contracting out the delivery of government programs or services provide that:

- **records relevant to the delivery of the program or service that are either transferred to the contractor, or created, obtained or maintained by the contractor, are considered to be under the control of the contracting institution; and**
- **the Act applies to all records considered to be under the control of the contracting institution, and the contractor must make such records available to the institution upon request.**

Records in Ministers' Offices

3-4 The Task Force recommends that:

- **the status of records in Ministers' offices be dealt with more explicitly in the Act; and**
- **training be provided for ministerial staff on records management and access to information.**

Public Servants' Notes

3-5 The Task Force recommends that:

- **the Act be amended to provide that records "under the control of a government institution"**
  - **do not include notes prepared by public servants for their own use, and not shared with others or placed on an office file;**
  - **do include such notes when they are used in an administrative decision-making process that can affect rights, or in a decision-making process reflected directly in government policy, advice or program decisions; and**
- **the *Access to Information Guidelines* be amended to elaborate on the scope of public servants' notes, and set out considerations to be taken into account by public servants and Access Coordinators in differentiating between public servants' own notes and records subject to the Act.**

Deliberations of Administrative Tribunals

3-6 The Task Force recommends that the Act exclude notes, analyses or draft decisions created by or for a person who is acting in a quasi-judicial capacity as a member of an administrative board or tribunal.

Records Within the Military Justice System

3-7 The Task Force recommends that the Act exclude notes, analyses or draft decisions created by or for a person who is acting in a judicial or quasi-judicial capacity within the military justice system.

Seized Records and Records Obtained in the Context of Litigation

3-8 The Task Force recommends that the Act exclude records seized in the course of a criminal investigation, and records obtained by the government in a civil proceeding under an implied undertaking of confidentiality.

---

4. Striking the Right Balance: Exemptions and Exclusions

Exemption/Exclusion Structure

Interpretation and Application of Exemptions – the Exercise of Discretion

4-1 The Task Force recommends that guidelines be issued on how to apply discretionary exemptions by:

- **exercising discretion as far as possible to facilitate and promote the disclosure of information;**
- **weighing carefully the public interest in disclosure against the interest in withholding information, including consideration of any probable harm from disclosure, and the fact that information generally becomes less sensitive over time; and**
- **having good, cogent reasons for withholding information when claiming a discretionary exemption.**

4-2 The Task Force recommends that the proper exercise of discretion in applying exemptions be a major element in Access to Information training.

Specific Exemptions/Exclusions

Deliberative Processes of Government

Section 69 – Cabinet Confidences

4-3 The Task Force recommends that Cabinet confidences no longer be excluded from the Act and that they be protected by a mandatory class exemption.

4-4 The Task Force recommends that a definition of "Cabinet confidence" be added to the Act, focusing on information that would reveal the substance of matters before Cabinet, and deliberations between or among Ministers.

4-5 The Task Force recommends that:

- **a prescribed format be developed for Cabinet documents that would allow for easy severance of background explanations and analyses from information revealing Cabinet deliberations such as options for consideration and recommendations; and**
- **the Act be amended to allow access to this background material once the related decision is announced, or after five years have passed, unless it contains information that should be protected under another exemption.**

4-6 **The Task Force recommends that the government consider reducing the protection for Cabinet confidences from 20 to 15 years.**

4-7 **The Task Force recommends that a decision to refuse to disclose information on the basis that it is a Cabinet confidence be reviewable by the Federal Court.**

Section 21 – Operations of Government

4-8 **The Task Force recommends that the Act be amended to clearly state that the exemption in Section 21 does not apply to the following records:**

- **factual material that in itself does not reflect the nature or content of advice;**
- **public opinion polls;**
- **statistical surveys;**
- **final reports or final audits on the performance or efficiency of a government institution or on any of its policies or programs;**
- **final reports of task forces, committees, councils or similar bodies established to consider any matter and to make reports to a government institution;**
- **appraisals (e.g. appraisal of a government institution's real estate holdings);**
- **economic forecasts;**
- **the results of field research;**
- **information that the head of a government institution has cited publicly as the basis for making a decision or formulating a policy; and**
- **substantive rules or statements of government policy that a government institution has adopted for the purpose of interpreting an Act or regulation or administering a program or activity.**

4-9 **The Task Force recommends that Section 21 be amended to reduce the protection of the exemption from 20 to 10 years (for other than not-yet-implemented personnel management or administrative plans).**

4-10 **The Task Force recommends that Section 21 of the Act be amended to protect personnel management or administrative plans that have not been approved, or have been rejected, for no more than five years from the date of rejection, or the date on which work was last done on the plan.**

4-11 **The Task Force recommends that Section 21(2)(b) of the Act be repealed thereby allowing the exemption to apply to consultants' work where it fits within the parameters of the exemption.**

National Security, Defence and Law Enforcement

Section 13 - Information Obtained in Confidence from Other Governments

4-12 **The Task Force recommends that Section 13 be amended to clarify that "foreign state" includes the political subdivisions of foreign states and other foreign authorities with which Canada has international and/or commercial relations.**

Section 16 – Law Enforcement and Investigations

4-13 The Task Force recommends that:

- **the exemption for information obtained or prepared in the course of a lawful investigation by an investigative body remain unchanged;**
- **the Regulations be amended to include criteria for investigative bodies; and**
- **the criteria focus on investigative work of a criminal or quasi-criminal nature.**

4-14 The Task Force recommends that Section 16(1)(c) be amended to permit the head of a government institution to refuse to disclose information where disclosure could reasonably be expected to harm foreseeable, as well as current, investigations.

Section 20 – Information Provided by Third Parties about Critical Infrastructure Vulnerabilities

4-15 The Task Force recommends that Section 20 of the Act be amended to clarify that information relating to critical infrastructure vulnerabilities, which third parties supply to the government, is covered by the section and the related notice and appeal provisions.

Other Exemptions/Exclusions

Section 17 – Safety of Individuals

4-16 The Task Force recommends that Section 17 of the Act be amended to permit the head of a government institution to refuse to disclose information that could reasonably be expected to threaten the physical or mental health, as well as the safety of individuals, or where disclosure would offend human dignity.

Section 18 – Economic Interests of Canada

4-17 The Task Force recommends that Section 18(a) be amended to apply to financial, commercial, scientific or technical information that has, or is likely to have, substantial *monetary* value.

4-18 The Task Force recommends that Section 18(b) be amended to extend protection to information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution, or *part of* a government institution.

4-19 The Task Force recommends that Section 18 be amended to include a provision specifying that the exemption does not extend to the results of product and environmental testing.

Section 19 – Personal Information

4-20 The Task Force encourages the Information Commissioner to consult with the Privacy Commissioner as early in the process as possible when issues arise relating to the release of personal information.

Section 20 – Third Party Information

4-21 The Task Force recommends that Section 20(6) be amended to add consumer protection as a public interest element for the head of a government institution to weigh in deciding whether to disclose information subject to this provision.

4-22 The Task Force recommends that the notification and appeal provisions of the Act be amended to provide for alternate forms of notice to third parties, such as publication in relevant trade journals.

4-23 The Task Force recommends that:

- **government institutions be encouraged to take steps to increase third party awareness of access to information; and**
- **the *Access to Information Guidelines* be updated to reflect the wealth of case law on Section 20, to assist public servants in its application, and to help educate third parties about the exemptions in Section 20.**

Section 22 – Testing Procedures, Tests and Audits

4-24 The Task Force recommends that Section 22 of the Act be amended to give the head of a government institution discretion to refuse to disclose draft internal audit reports and related audit working papers until the earliest of:

- **the date the report is completed;**
- **six months after work on the audit has ceased; or**
- **two years following commencement of the internal audit.**

Section 23 – Solicitor-Client Privilege

4-25 The Task Force recommends that:

- **training be provided to government lawyers and government institutions on the application of the Act to records subject to solicitor-client privilege; and**
- **the *Access to Information Guidelines* be amended to describe the nature and scope of solicitor-client privilege in greater detail, and the steps to be taken in determining whether all or part of a record should be released under Section 23.**

4-26 The Task Force recommends that the Government consider amending Section 23 of the Act to provide that severance of a record subject to solicitor-client privilege does not result in waiver of the privilege with respect to the rest of the record, or other related records also subject to the privilege.

Section 24 – Statutory Prohibitions

4-27 The Task Force recommends that the exemption for statutory prohibitions in Section 24 be retained.

4-28 The Task Force recommends that:

- **the Act be amended to specify criteria for confidentiality provisions from other statutes included on Schedule II;**
- **the Act be amended to include a provision allowing the Governor-in-Council to add confidentiality provisions to Schedule II only if they meet the criteria;**
- **the criteria ensure that the Schedule include only confidentiality provisions that offer a very firm assurance that information will be protected, as evidenced by a prohibition against disclosure, or clearly-defined limits on any discretion to disclose; and**
- **the *Access to Information Guidelines* provide further details about the criteria and approval process for additions to the Schedule, and require the applicant institution to demonstrate why the other exemptions in the Act are not sufficient to protect the information in question.**

4-29 **The Task Force recommends that all statutory provisions that prevail over the *Access to Information Act* be listed in Schedule II to the Act.**

4-30 **The Task Force recommends that:**

- **the existing list in Schedule II be examined to substantially reduce the number of provisions, by assessing them against the criteria proposed for inclusion in the Act; and**
- **the Act be amended to allow the Governor-in-Council to delete provisions listed on Schedule II.**

4-31 **The Task Force recommends that:**

- **government institutions continue to report annually on the number of occasions on which they refused to disclose information on the basis of Section 24, and the Schedule II provisions relied upon; and**
- **Schedule II be reviewed periodically by a parliamentary committee.**

Section 26 – Refusal of Access Where Information is About to be Published

4-32 **The Task Force recommends that:**

- **the Act be amended so that Section 26 provides that the head of a government institution may refuse to disclose information if it is to be published within 90 days or within "such further period of time as may *reasonably* be necessary for preparing the material for *publication*, including translating it for the purpose of *publication*;"**
- **the *Access to Information Guidelines* set out best practices in relation to the application of Section 26 (e.g. release the material if it is not actually in translation or being formatted for publishing at the end of the 90-day period); and**
- **Access to Information training emphasize that Section 26 should be claimed only where there is a high degree of certainty that material in the record requested will be published.**

Section 68 – Exclusion of Published Materials

4-33 **The Task Force recommends that:**

- **the exclusion for published materials in Section 68 remain the same; and**
- **the *Access to Information Guidelines* be amended to make it clear that government institutions should provide reasonable assistance to requesters in locating materials published by the government.**

Protecting Cultural and Natural Heritage Sites

4-34 **The Task Force recommends that the Act be amended to include a discretionary exemption for records containing information the disclosure of which could damage or interfere with the preservation, protection or conservation of cultural and natural heritage sites, other sites that have an anthropological or heritage value, or sacred sites of aboriginal peoples.**

5. The Access Process in the Act

Requests

Format of Release

5-1 The Task Force recommends that the *Access to Information Regulations* be amended to provide that a requester may indicate a preferred format, and that where information can be disclosed and already exists in that format, it should be provided.

Clarifying and Determining the Scope of Requests

5-2 The Task Force recommends that the *Access to Information Guidelines* be amended to encourage Access Coordinators to contact requesters upon receipt of a request, in order to confirm or clarify it, and to ensure that the request is focused on the information the requester really wants.

Defining a request

5-3 The Task Force recommends that the Act be amended to clarify that requests must refer to a specific subject matter, or to specific records.

Frivolous, Vexatious or Abusive Requests

5-4 The Task Force recommends that:

- the Act be amended to authorize institutions, with the agreement of the Information Commissioner, to refuse to process requests that are frivolous, vexatious or abusive; and
- the Treasury Board Secretariat, in consultation with the Information Commissioner, issue detailed guidelines to government institutions providing the criteria for identifying a frivolous, vexatious or abusive request.

Time Limits

Thirty-Day Time Limit

5-5 The Task Force recommends that Section 7 of the Act (which gives the time limit for notifying the requester) be amended to substitute "twenty-one working days" for "thirty days", and that all of the time limits for processing requests also be adjusted to reflect working days.

Extensions

5-6 The Task Force recommends that Paragraph 9(1)(a) of the Act be amended to permit an extension of the time for responding to a request if "meeting the original time limit would unreasonably interfere with the operations of the government institution".

Release of Processed Records

5-7 The Task Force recommends that Access to Information Coordinators be encouraged to offer to release information to requesters as soon as it is processed, without waiting for the deadline, or for all of the records to be processed.

When Time Limits Are Not Met

5-8 The Task Force recommends that the *Access to Information Policy* require that:

- where a government institution concludes that it will be unable to respond within the legislated time-frames, the institution inform the requester in writing that its response will be late, explaining the reason for the delay, the expected date of response, and that the requester can complain to the Information Commissioner;
- institutions provide the Information Commissioner with a copy of the letter;
- Access Coordinators report on a regular basis to their Deputy Minister, or equivalent, on the number of occasions on which the time limits were not met and the reasons for the delays; and
- government institutions report this information in their annual access to information reports to Parliament.

Fees

Application Fee

5-9 The Task Force recommends that the *Access to Information Regulations* be amended to make the application fee $10.

A Differential Fee Structure – Commercial and General Requests

5-10 The Task Force recommends that the Act and the Regulations be amended to reflect a fee structure that differentiates between commercial requests and general (non-commercial) requests.

5-11 The Task Force recommends that the criteria for determining which requests are commercial be incorporated in the Regulations, and that these criteria make clear that the types of requests received from individual Canadians for their own use, as well as requests from academics, Members of Parliament, non-profit public interest organizations, and the media, are normally non-commercial.

Encouraging Focused Requests

5-12 The Task Force recommends that non-commercial requests receive up to five hours of search and preparation time, and up to 100 pages of records (or equivalent) for the application fee, beyond which they be charged the hourly rate set by Regulation for search and preparation and the set rate for reproduction.

A Fee Structure for Commercial Requests

5-13 The Task Force recommends that commercial requests be charged the set hourly rate for all reasonable hours of search, preparation and review, and the set rate for all reproduction.

Fee Rates

5-14 The Task Force recommends that the fee rates be updated to reflect inflation and the fee structure be updated to reflect the new media of reproduction.

Extremely Large Requests

5-15 The Task Force recommends that:

- the Act be amended to provide that an alternate fee structure may be applied to the small number of very large requests where the cost of processing exceeds a set limit of $10,000;
- the alternate fee structure should provide for full recovery of any reasonable costs that can be directly attributed to the processing of the request; and
- institutions be required to report on their application of this section in their annual report to Parliament, and the limit be reviewed if the number of requests covered by the alternate fee structure exceeds 2 per cent of all the requests processed throughout government in any given year.

Fee Waiver Criteria

5-16 The Task Force recommends that:

- the *Access to Information Policy* be revised to set out the factors to be considered in making decisions on whether to waive fees; and
- the criteria take into account the degree to which release of the information will serve the public interest, any financial hardship the fees would cause to the applicant, whether the amount payable is less than the expected cost of administering the fee, and the timeliness of the response to the requester.

5-17 The Task Force recommends that institutions be required to:

- track the time they spend on processing all requests, whether fees are collected or not;
- record the reasons for waiving fees; and
- include information on fee waivers in their annual report to Parliament.

Expedited Delivery

5-18 The Task Force recommends that requesters be given the option, at their own expense, of expedited delivery by the method of their choice.

Reinvesting Fees

5-19 The Task Force recommends that the government reinvest the fees collected under the *Access to Information Act* in ways that will improve how the system works.

Multiple Requests

5-20 The Task Force recommends that the Act be amended to authorize institutions to aggregate requests where:

- they are from the same requester or from multiple requesters acting together;
- they are on the same or a reasonably similar topic;
- they are received within 21 working days of each other; and
- the head of the institution is of the opinion that the requests were made in a manner intended to avoid fees or the application of a time limit extension.

Duty to Assist the Requester

5-21 The Task Force recommends that the Act be amended to:

- require institutions to make a reasonable effort to assist applicants on request; and
- require institutions to contact requesters before notifying them of a refusal to process their request on the grounds that it is frivolous, vexatious or abusive, or of a decision to aggregate the request with one or more other requests, or to categorize the request as subject to full-cost recovery, in order to assist them in re-formulating the request in a way that will avoid the negative outcome.

---

6. Ensuring Compliance: The Redress Process

Right to Complain

Administrative Review

6-1 The Task Force recommends that an internal administrative review mechanism not be added to the current process.

Right to Complain About Fees

6-2 The Task Force recommends that the Act be amended to provide that any applicant whose request has been categorized as commercial, who has had fees assessed under the alternate fee schedule, or who has been required to pay fees that the applicant considers unreasonable, may, after receiving a finding by the Information Commissioner, apply to the Federal Court for review.

Time to Complain

6-3 The Task Force recommends that the Act be amended to require that a complaint be made within 60 days after notice was given of any decision of the institution. Or, if no notice has been given to the requester and the time limit set by the Act for responding has expired, a complaint must be made within such reasonable time as the Information Commissioner may allow.

Fees to Complain

6-4 The Task Force recommends that there continue to be no fee for filing a complaint with the Information Commissioner.

Mandate of the Information Commissioner

Education Mandate

6-5 The Task Force recommends that:

- the Act be amended to recognize the role of the Information Commissioner in educating the public about the Act and access to government information in general; and
- the Treasury Board Secretariat invite the Information Commissioner to participate in education programs for the public service.

6-6 The Task Force recommends that:

- the Information Commissioner publish case summaries, including reasons for findings, on an ongoing basis, with a view to providing guidance to the institutions and to requesters; and
- Section 64 of the Act be amended to extend to the publishing of case summaries the duty of the Information Commissioner to take reasonable precautions to avoid the disclosure of protected information.

Advisory Mandate

6-7 The Task Force recommends that the Act explicitly recognize the role of the Information Commissioner in advising government institutions on the implications for access to information of proposed legislation, regulations, policies or programs of the government, on the administration of the Act in institutions, and in encouraging institutions to adopt good practices, including the proactive dissemination and informal release of information.

Practice Assessment Mandate

6-8 The Task Force recommends that:

- the Act be amended to authorize the Information Commissioner to conduct assessments of practices of institutions having an impact on compliance; and
- the Office of the Information Commissioner and the Treasury Board Secretariat collaborate in conducting assessments of institutional practices.

Mediation Mandate

6-9 The Task Force recommends that:

- the Act be amended to formally empower the Information Commissioner to attempt to effect the settlement of complaints through mediation;
- the mediation process be articulated and communicated to both institutions and complainants; and
- as a general rule, Access to Information Coordinators and officials from the Office of the Information Commissioner should be delegated the authority to agree to mediated solutions to complaints.

Investigating Complaints

A Shared Understanding

6-10 The Task Force recommends that the Information Commissioner prepare and publish comprehensive procedural guidelines for investigations, which should be consistent with the requirements of procedural fairness.

6-11 The Task Force recommends that:

- training and information sessions on the investigative process be offered to access officials by the Office of the Information Commissioner;
- investigators of the Office of the Information Commissioner meet from time to time with access officials to clarify and resolve general issues related to the investigation process in order to make investigations more efficient and effective;

- **tools for the investigation be developed that would guide both investigators and institutions in the efficient resolution of a complaint; and**
- **investigators be assigned to specific portfolios of government institutions to enhance their understanding of those institutions, with periodic rotation of assignments.**

Clarity as to Issues under Investigation

6-12 The Task Force recommends that investigators provide institutions, as early as possible in the course of the investigation, with a clear and complete understanding of the issues to be resolved.

Documenting the Handling of the Request

6-13 The Task Force recommends that the Treasury Board Secretariat, with the advice of the Office of the Information Commissioner, work with institutions to develop realistic standards for the documentation of process files.

Investigations into Process Matters

6-14 The Task Force recommends that:

- **the procedure for investigating process issues such as fees, delays, extensions and format, be reviewed for ways to resolve them in as short a time as possible; and**
- **institutions come up with standards for responding to investigations, and plan for reasonable resources to meet these standards.**

Reviews Conducted in Writing

6-15 The Task Force recommends that the Information Commissioner, in consultation with the Treasury Board Secretariat, study the suitability of reviews conducted in writing for some types of investigations.

Timely Investigations

6-16 The Task Force recommends that the Act be amended to require the Information Commissioner to complete investigations within 90 days, with the discretion to extend this period for a reasonable time if necessary, on giving notice of the extension to the complainant, the government institution involved and any third parties.

Role of Complainant

6-17 The Task Force recommends that the Commissioner's procedural guidelines allow for greater involvement of complainants in the investigation process.

Formal Investigations – Ensuring Procedural Fairness

Confidentiality of the Investigations

6-18 The Task Force recommends that:

- **Section 35 of the Act be amended to provide that investigations may be conducted in private; and**
- **investigation procedures, including the need for confidentiality, not prevent government institutions or individuals from presenting a full response in the course of an investigation.**

Right to Counsel

6-19 The Task Force recommends that:

- **the Act be amended to provide witnesses testifying under oath with a right to legal representation; and**
- **witnesses have the right to choose their legal representative.**

Subpoenas

6-20 The Task Force recommends that:

- **no application to the Federal Court be required for the issuance of a subpoena by the Information Commissioner under the *Access to Information Act*;**
- **subpoenas be limited to investigations of specific complaints, not broadly based inquiries about the functioning of the access process;**
- **subpoenas only be issued to officials who have actual knowledge of the file; and**
- **the Information Commissioner's procedural guidelines provide that appropriate notice be given to institutions, witnesses and Access Coordinators that a subpoena will issue.**

Notice to Affected Individuals

6-21 The Task Force recommends that:

- **Section 32 be amended to extend the duty of the Commissioner to give notice to the head of the government institution and provide information on the complaints before commencing an investigation, to any person the Commissioner considers appropriate;**
- **the Commissioner's procedural guidelines provide that notice will be given to any person whose actions or conduct are called into question by a complaint; and**
- **the Commissioner's procedural guidelines provide that a notice of possible adverse findings will be given to individuals as soon as there is an indication that they might be adversely affected by any findings or comments in the Commissioner's report.**

Solicitor-Client Privilege

6-22 The Task Force recommends that the Act be amended to provide that the Information Commissioner cannot compel an institution or an individual to produce a communication from or to a legal advisor about the client's rights and obligations under the Act or in contemplation of proceedings under the Act.

Contempt Powers

6-23 The Task Force recommends that the Act be amended to provide that contempt charges are to be heard by a judge of the Federal Court of Canada.

Compellability of the Information Commissioner

6-24 The Task Force recommends that the Act be amended to clarify that evidence given to the Commissioner or the Commissioner's staff by a witness is inadmissible against the witness in a prosecution under Section 67.1, and that the Information Commissioner and any person working on the Commissioner's behalf are not competent or compellable witnesses in a prosecution under Section 67.1 of the Act.

Structural Models for the Review Process

Full Order-Making Powers

6-25 The Task Force encourages the government to consider moving to an order-making model for the Information Commissioner in the medium-term.

---

7. The Way to a Better Access Process

Facilitating Access for Canadians

Helping Canadians to Access Information

7-1 The Task Force recommends that:

- the Government of Canada Web site, and those of individual government institutions, include easily retrievable information on submitting requests under the *Access to Information Act*, and on the organization and responsibilities of those institutions; and
- this information include descriptions of their programs and functions, the types of records they hold and how their records can be effectively identified.

7-2 The Task Force recommends that the Treasury Board Secretariat take steps, in conjunction with institutions across government, to make both the hard-copy and Web-based versions of *Info Source* more user-friendly.

Facilitating the Openness of the Access Process

7-3 The Task Force recommends that the Co-ordination of Access to Information Request system (CAIR) be redesigned to make it more user-friendly, and that its component containing information on completed requests across government be made available to the public on a government Web site.

7-4 The Task Force recommends that government institutions be encouraged to post summaries of the information they have released which may be of interest to others, in addition to depositing a hard copy of the documents in their reading rooms.

Facilitating Electronic Request Processing

7-5 The Task Force recommends that the Treasury Board Secretariat investigate ways to encourage initiatives that support electronic processing of requests.

Resourcing the Access Program

Central Resourcing

7-6 The Task Force recommends that the government allocate increased resources to:

- the central policy and legal advice areas of the Treasury Board Secretariat and the Department of Justice;
- the Office of the Information Commissioner; and
- the access units of institutions.

Resourcing of Individual Institutions

7-7 **The Task Force recommends that government institutions manage their Access to Information responsibilities in the same way that they manage other programs, and establish resource planning mechanisms, including resource forecasting, performance measurement and system analysis, as part of their operations.**

7-8 **The Task Force recommends that:**

- **Treasury Board Secretariat work with institutions to develop resourcing standards and costing models based on workload analyses; and**
- **the government encourage firms to create pools of qualified individuals who could be hired on contract as necessary to meet unanticipated demands, through such means as master standing offer arrangements.**

Effective Processing of Requests

Making Decisions in Response to Requests

7-9 **The Task Force recommends that every institution examine their decision-making process for factors affecting timeliness and quality, including their delegation of authority under the Act, to ensure that as few approvals as possible are required, and that responsibilities are delegated as far down the organization as possible.**

Supporting Access Officials

Roles and Responsibilities

7-10 **The Task Force recommends that the role, duties and responsibilities of Access to Information Coordinators be described in more detail in the *Access to Information Policy and Guidelines*, in the access policies of individual government institutions, and in information about the access process provided to the general public.**

7-11 **The Task Force also recommends that the *Access to Information Policy and Guidelines* articulate the roles and responsibilities of heads of institutions, Deputy Heads, program managers and other employees in meeting their statutory obligations under the Act.**

7-12 **The Task Force recommends that the *Access to Information Policy* require that Coordinators have ready access to the Deputy Head and senior management of their institution.**

Access to Expertise and Advice

7-13 **The Task Force recommends that the Treasury Board Secretariat expand its capacity as the central source of expertise within the government on the operation and administration of the Act, and provide more active support to government institutions, by, for example, providing more advice and guidance to departments on implementation issues, and by gathering and disseminating best practices.**

7-14 **The Task Force recommends that the Department of Justice enhance its capacity to provide expertise in, and advice on, issues of access to information law to government institutions, as well as to the access community, through the Departmental Legal Services Units and through such avenues as information sessions for access officials.**

Training for Access to Information Officials

7-15 The Task Force recommends that:

- Treasury Board Secretariat take the lead in developing enhanced training and learning opportunities for access to information officials;
- access officials be required to complete the parts of the training appropriate to their level of responsibility;
- information technology training be included in the compulsory training for access officials;
- Treasury Board Secretariat support training in access to information by educational institutions across Canada; and
- access officials be provided with regular opportunities, through learning networks, to share information and best practices with their counterparts in other institutions.

Careers in Access

7-16 The Task Force recommends that the Treasury Board Secretariat:

- consider including access to information positions in classification groupings with other related disciplines;
- assess the appropriateness of classification levels of ATI positions across the government; and
- develop standardized statements of qualifications for ATI positions, along with tools to help institutions determine the qualifications needed for particular positions.

Tools

7-17 The Task Force recommends that the Treasury Board Secretariat encourage the use of, and consider providing smaller institutions with, request-tracking software.

---

8. Meeting the Information Needs of Canadians Outside the Access to Information Act

8-1 The Task Force recommends that all of the ways that information can be provided to the public (including access under the Act) should be considered during the design and implementation phases of any new program or activity of the government.

8-2 The Task Force recommends that the Government of Canada Web site provide an explanation of the different ways that government information can be accessed.

Proactive Dissemination

8-3 The Task Force recommends that government institutions more systematically identify information that is of interest to the public and develop the means to disseminate it proactively. These means should include regular publication, and the use of Web sites, or special arrangements or partnerships with the private sector, where appropriate.

Passive Dissemination – Libraries and Virtual Reading Rooms

8-4 The Task Force recommends that, where there is an identified need or interest, and where the information is not sensitive, government institutions make as much information as possible available to the public either in hard copy or electronically.

Informal Release

8-5 The Task Force recommends that government institutions:

- **routinely release information, without recourse to the Act, whenever the material is low-risk in terms of requiring protection from disclosure; and**
- **establish protocols for use in identifying information appropriate for informal disclosure.**

8-6 The Task Force recommends that government institutions describe their informal disclosure and proactive and passive dissemination practices in their annual reports to Parliament under the *Access to Information Act* and on their Web sites.

Special Disclosure Mechanisms for Research Purposes

8-7 The Task Force recommends that, where there is an ongoing, regular demand for access from researchers, government institutions establish processes outside the *Access to Information Act*, building on the examples already established in several departments.

Systematic 30-Year Bulk Review

8-8 The Task Force recommends that the National Archives play the lead role in developing and adopting processes for the systematic bulk review and release of historical records.

---

9. Addressing the Information Management Deficit

An Information Management Strategy

9-1 The Task Force recommends that:

- **a co-ordinated government-wide strategy be developed to address the crisis in information management;**
- **a short-term plan be developed to deal with the most immediately critical needs and a longer-term plan to build ability and structure for the future; and**
- **this strategy provide for partnerships among the agencies with primary responsibility for information management (Treasury Board Secretariat, the National Archives and the National Library) and other government institutions.**

Security Classification and Information Management

9-2 The Task Force recommends that:

- **training on the safeguarding, classification and designation of information in accordance with the *Government Security Policy* be incorporated into an integrated training package that would cover information management and Access to Information;**
- **security classification be included in electronic records management systems; and**
- **public service managers ensure good practices in their units with respect to the classification of records and the realistic assessment of the sensitivity of information.**

Accountability for Information Management

9-3 The Task Force recommends that:

- **an effective accountability regime for information management, including the necessary audit and evaluation tools, be established and implemented within government institutions; and**
- **a reinvigorated, government-wide framework for monitoring information management be established and implemented by the National Archives, in partnership with the Treasury Board Secretariat and the National Library.**

Support for Public Servants

9-4 The Task Force recommends that:

- **standards be established for the documentation of the business of government;**
- **orientation and training, and ongoing guidance in information management, be available for all employees;**
- **a user-friendly, authoritative, practical guide be developed to assist public servants in creating, managing and disposing of their records; and**
- **a central area of expertise in information management be established, with responsibility for keeping the government's Information Management Framework up to date through research into standards and best practices.**

---

10. Measuring and Reporting on Performance

Improved Assessment of Access Activities

10-1 The Task Force recommends that the Treasury Board Secretariat, working with the Office of the Information Commissioner, develop several common performance measurement indicators, giving priority to a measure of the complexity of requests.

10-2 The Task Force recommends that institutions develop performance measurement indicators to help them identify those areas of their institutions that are having difficulty, or systemic problems affecting their institution that senior management could address.

10-3 The Task Force recommends that institutions' annual reports to Parliament be expanded to include:

- **information on strategies to provide information outside the Act;**
- **initiatives undertaken to improve the access to information system;**
- **issues arising during the year that significantly affected the institution's Access to Information program; and**
- **planned improvements to respond to identified problems or trends.**

10-4 The Task Force also recommends that the Treasury Board Secretariat's annual aggregate report provide a much broader view of how the system is working across government, and include analysis of trends on key issues.

---

11. Creating a Culture of Access to Government Information

Fundamental Values of the Public Service

11-1 The Task Force recommends that:

- **the Statement of Principles of the Public Service of Canada refer to the responsibilities of public servants as stewards of government information and as providers of access to that information; and**
- **training modules for public servants, including orientation sessions for new employees and courses for managers, stress the linkages between access to information and core public service values.**

Awareness and Training for Public Servants

11-2 The Task Force recommends that:

- **awareness of access to information and information management be part of orientation programs for new public servants;**
- **generic training modules on access to information be developed for the training of program staff, in a form that can readily be customized to meet the needs of individual government institutions; and**
- **all managers receive access to information training, including the efficient management of access requests from a program perspective and best practices in managing information and in creating a culture of access.**

Embedding Access in the Worklife – Incentives and Accountability

11-3 The Task Force recommends that:

- **responsibilities related to access to information and information management be included in the job description of officers and managers;**
- **objectives related to access to information and information management be part of the accountability agreement and performance reviews of all managers;**
- **government institutions discuss their performance on access to information on a regular basis at management meetings;**
- **when new programs are established, an access to information component be included from the outset as an integral part of the program; and**
- **access to information goals be integrated in annual corporate plans for government institutions.**

Serving Ministers

11-4 The Task Force recommends that:

- **Deputy Ministers brief Ministers on their responsibility for implementing the Act;**
- **Deputy Ministers assist Ministers in making their support for access and their expectations for compliance clear to the government institutions for which they are responsible; and**
- **staff in Ministers' offices receive access to information and records management training soon after their appointment.**

Providing Corporate Leadership

11-5 The Task Force recommends that the Treasury Board Secretariat strengthen its role as the centre of excellence for access to information in the government and as access "champion" for the government as a whole.

Signaling Change and Fostering Key Attitudes

11-6 The Task Force recommends that the training of public servants emphasize that they are stewards of government information on behalf of Canadians; that the provision of information is an integral part of their job; and that the records they create in the course of their work are records of the Government of Canada, and for the most part can be made public.

11-7 The Task Force recommends that, in conjunction with its response to our recommendations, the government launch a broad campaign in the public service to enhance awareness of access to information, appreciation of its principles and pride in providing information to Canadians.

12. Last Word: Enhanced Dialogue on Access to Information

12-1 The Task Force recommends that:

- the Treasury Board Secretariat consider setting up an advisory committee of stakeholders and access officials to provide ongoing advice on the administration of the Act;
- a full review of the Act and its operation be conducted every 5 to 10 years; this could be done either by reviewing the Act as a whole, or by looking regularly at specific areas of legislation and practice; and
- there be enhanced ongoing Parliamentary oversight of the access to information regime.

Annex 1

Data

Access to Information – Processing of Requests Comparison 2000-2001 / 1983-2001

	2000-2001	1983-2001
Disposition of requests completed:		
– All disclosed	37.5%	35.1%
– Some disclosed	35.6%	35.0%
– No records disclosed – excluded	0.3%	0.6%
– No records disclosed – exempted	3.0%	3.2%
– Transferred	1.3%	1.9%
– Treated informally	1.9%	4.9%
– Could not be processed (Reasons include: insufficient information provided by applicant, no record exists and abandonment by applicant)	20.4%	19.3%
Time Required to Complete Requests:		
0 - 30 days	59.3%	57.7%
31- 60 days	17.1%	17.8%
61 + days	23.6%	24.5%
Cost per request completed	$1,035	$906
– Fees collected per request completed	$12.47	$14.21
– Fees waived per request completed	$7.45	$5.82

Exemptions and Exclusions 2000-2001

TOTAL EXEMPTIONS	100.0%	19,424
Section 19 – Personal information	28.0%	5,433
Section 20 – Third party information	23.9%	4,634
Section 21 – Operations of government (advice, recommendations, consultations, plans)	18.6%	3,608
Section 16 – Law enforcement and investigations	8.1%	1,564
Section 15 – International affairs and defence	5.4%	1,059
Section 13 – Information obtained in confidence from another government	5.0%	967
Section 23 – Solicitor-client privilege	4.3%	840
Section 14 – Federal-provincial affairs	2.4%	463
Section 18 – Economic interests of Canada	2.2%	428
Section 24 – Statutory prohibitions	1.3%	259
Section 26 – Information to be published	0.3%	68
Section 17 – Safety of individuals	0.3%	55
Section 22 – Testing procedures	0.2%	46
TOTAL EXCLUSIONS		1,356
Section 68 – Published material, library or museum material, exhibition material[1]		108
Section 69(1) – Cabinet Confidences[2]		1,248

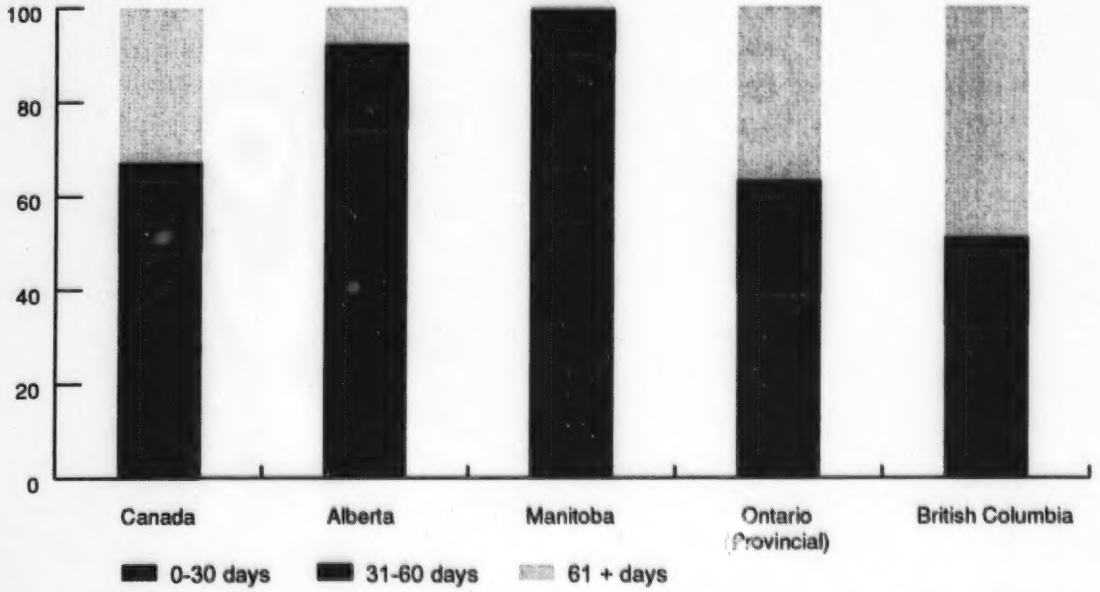
---

[1] Section 68 was claimed in .5 per cent of refusals to disclose (exemptions and exclusions).

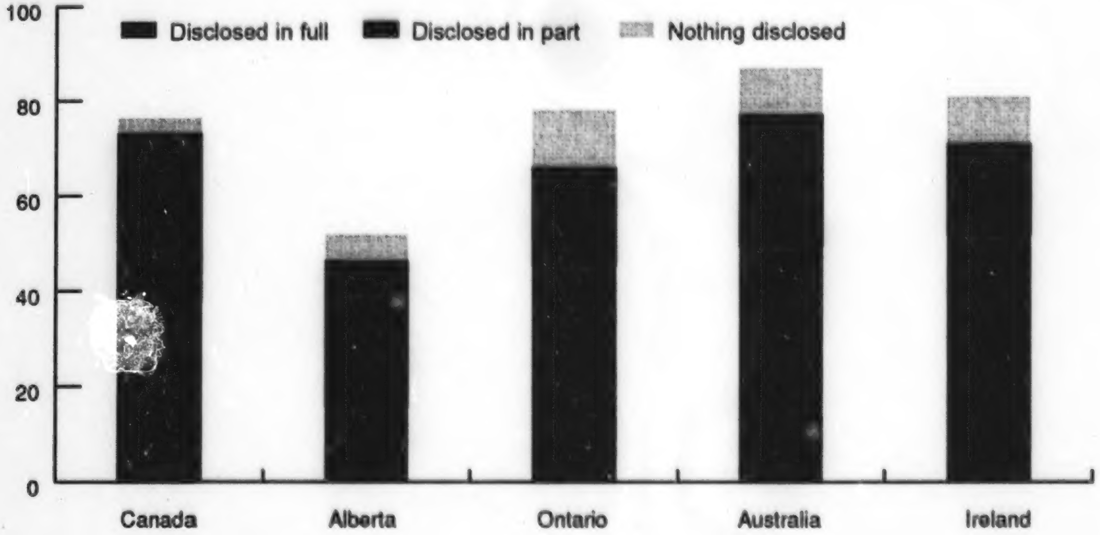
[2] Section 69 was claimed in 6 per cent of refusals to disclose (exemptions and exclusions).

Comparisons with other jurisdictions

Comparative Response Times – 2000-2001



Disposition of requests – 2000-2001



Complaints to the Information Commissioner – 2000-2001[1]

Complaints received:	**1,688**
Complaints completed:	**1,337**
Pending at end of year:	**922**

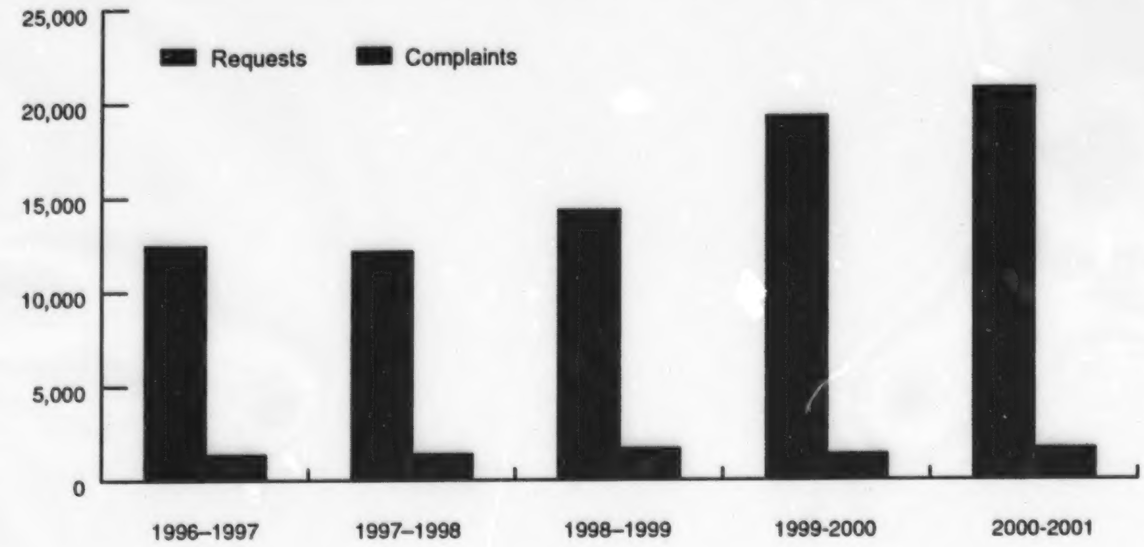
Findings

CATEGORY	RESOLVED	NOT RESOLVED	NOT SUBSTANTIATED	DISCONTINUED	TOTAL	%
Refusal to disclose	263	2	187	82	534	39.9
Delay (deemed refusal)	493	–	50	32	575	43.1
Time extension	83	–	66	2	151	11.3
Fees	28	–	20	6	54	4.0
Language	–	–	–	–	–	–
Publications	–	–	–	–	–	–
Miscellaneous	13	–	6	4	23	1.7
TOTAL	880	2	329	126	1,337	100
100%	65.8	0.1	24.6	9.4		

Processing of Complaints – Turnaround Time

CATEGORY	1998-1999		1999-2000		2000-2001	
	MONTHS	CASES	MONTHS	CASES	MONTHS	CASES
Refusal to disclose	5.86	526	5.99	537	7.83	534
Delay (deemed refusal)	2.50	669	3.44	749	3.33	575
Time extension	2.80	71	2.33	134	4.18	151
Fees	5.69	45	5.41	55	7.02	54
Language	–	–	–	–	–	–
Publications	–	–	–	–	–	–
Miscellaneous	4.54	40	4.34	55	4.61	23
Overall	3.99	1,351	4.34	1,530	5.40	1,337

Canada – Total Requests and Total Complaints Received over 5-year Period



---

[1] The data for 2001 - 2002 is now available on the Office of the Information Commissioner's Web site at www.infocom.gc.ca

Annex 2

Fees Charged by Provincial and International Jurisdictions – Chart

Fees Charged by Provincial and International Jurisdictions

	APPLICATION FEE	NO CHARGE FOR...	SEARCH/LOCATE/ RETRIEVE FEE	REVIEW FEE
PROVINCIAL				
Alberta	$25 $50 for ongoing request for up to 2 years		$6.75 per 1/4 hr ($27/hr)	No Charge
British Columbia (Non-commercial applicants)	No charge	First 3 hours of locating & retrieving	$7.50 per 1/4 hr ($30/hr)	No Charge ($30/hr)
Commercial Applicants			Actual Cost	
Manitoba	No charge (though the Act allows for it)	First 2 hours of search & preparation	$15 per 1/2 hr ($30/hr)	No Charge
Ontario	$5 per request; $25 per appeal		$7.50 per 1/4 hr ($30/hr)	
Québec	No charge	First $5 for transcription, transmission of document		
Nova Scotia	$25 per request; $25 per appeal		$15 per 1/2 hr ($30)	

	PREPARATION FEE	COPYING FEE	SUPERVISION FEE	SHIPPING/ DELIVERY FEE	WAIVER CRITERIA
	$6.75 per 1/4 hr ($27/hr)	$6.75 per 1/4 hr ($27/hr)	$6.75 per 1/4 hr ($27/hr)	Actual Cost	At head's discretion based on list of factors
	$7.50 per 1/4 hr used	Charge depends on medium		Actual Cost to matter of public	- Unaffordable - Fair to waive - Record relates interest
	Actual Cost	Actual Cost		Actual Cost	
	$15 per hal fhour ($30/hr)	.20 – .50 pp depending on printer used. Actual cost for other medium		No charge for regular mailing costs Actual cost Actual cost	- Financial hardship - Record relates to matter of public interest concerning public health, safety or the environment
	$7.50 per 1/4 hr ($30/hr)	.20 pp; $10 for each floppy disk			Whether access will be granted. If amount <$5, and too small to justify
		25 pp; $10 for each floppy disk. All fees are adjusted to Consumer Price Index each year			
	$15 per 1/2 hr ($30)	.20 pp photocopying or actual cost		Actual cost for method chosen by requester	Whether access is given. Fee too small to justify cost of collection.

Fees Charged by Provincial and International Jurisdictions (cont'd)

	APPLICATION FEE	NO CHARGE FOR...	SEARCH/LOCATE/ RETRIEVE FEE	REVIEW FEE	
INTERNATIONAL					
Australia	$30 per request ($24.65 Cdn)		$15 per hour ($12.32 Cdn)	$20 per hour ($16.40 Cdn)	
Ireland	No charge		£16.50 per hour ($29.00 Cdn)	No Charge	
New Zealand (Non-commercial applicants)	No Charge	First hour of staff time (for search & retrieval; copying; transcribing;	$28 per half hour ($18.81 Cdn)	No charge	
Commercial Applicants		Actual Cost to first requester		Actual Cost to first requester	
United Kingdom	No Charge		Not to exceed 10% of prescribed costs & disbursements. If the costs exceed £550 ($1250 Cdn) fee will be 10% of prescribed costs (£55 or $125 Cdn) for first £550 plus full amount of prescribed costs & disbursements over £550.	No Charge	

	PREPARATION FEE	COPYING FEE	SUPERVISION FEE	SHIPPING/ DELIVERY FEE	WAIVER CRITERIA
		.10 pp for paper copies or .08 Cdn; $4.40 pp for all other types of copies or $3.61 Cdn; actual cost for all other types of media	$6.25 per half hour ($5.13 Cdn)		Charges would cause financial hardship or access is in the public interest
	No Charge	3 pence per photocopied sheet or .05 Cdn			Would assist understanding of an issue of national importance
	$28 per half hour ($18.81 Cdn)	$28 per half hour ($18.81 Cdn) .20/page photocopying (.13 Cdn)	$28 per half hour ($18.81 Cdn)		- Financial hardship - Facilitate public relations - Assist dept in its work - Enhanca public interest in government
	Actual Cost to first requester	Actual Cost to first requester	Actual Cost to first requester		Not available if in commercial interest of requester
	Not to exceed 10% of prescribed costs & disbursements. If the costs exceed £550 ($1250 Cdn) fee will be 10% of prescribed costs (£55 or $125 Cdn) for first £550 plus full amount of prescribed costs & disbursements over £550.	Not to exceed 10% of prescribed costs & disbursements. If the costs exceed £550 ($1250 Cdn) fee will be 10% of prescribed costs (£55 or $125 Cdn) for first £550 plus full amount of prescribed costs & disbursements over £550.		Not to exceed 10% of prescribed costs & disbursements. If the costs exceed £550 ($1250 Cdn) fee will be 10% of prescribed costs (£55 or $125 Cdn) for first £550 plus full amount of prescribed costs & disbursements over £550.	

Fees Charged by Provincial and International Jurisdictions (cont'd)

	APPLICATION FEE	NO CHARGE FOR...	SEARCH/LOCATE/ RETRIEVE FEE	REVIEW FEE	
INTERNATIONAL					
United States (Requests for non-commercial purposes by education, science or news media)	No charge		No charge	No charge	
Commercial Requesters	No charge		Each Agency promulgates its own fees	Direct costs but does not include time spent on general legal/ policy issues	
All others	No charge	First 2 hours of search time & first 100 pages	Reasonable charges per Agency fee schedule		
Canada	$5 per request	First 5 hours search & preparation for non-computerized record	$2.50 per 1/4 hour ($10 per hour)	No charge	

	PREPARATION FEE	COPYING FEE	SUPERVISION FEE	SHIPPING/ DELIVERY FEE	WAIVER CRITERIA
	No charge	No charge			Is in public interest as a significant contribution
		Direct costs			If commercial interest is less than public interest & is likely to contribute significantly to understanding of operations or activities of government
		Reasonable charges per Agency fee schedule			Is in public interest as a significant contribution
	$2.50 per 1/4 hour ($10 per hour)	.20 per page; .40 per fiche; $12 per 16 mm 30.5 m microfilm roll; $14 per 35 mm 30.5 m roll; for microform to paper, .25/pp;	None	No charge for regular post	In Guidelines - public benefit - normally available without charge - fee payable less than $25

Annex 3

Glossary

Access / ATI Coordinator
The officer designated for each government institution who co-ordinates all activities relating to the operation of the Act, and the regulations, directives and guidelines pursuant to it, within the institution.

Access to Information Official
Is a public servant with responsibility for processing ATI requests, either full or part-time, including Access analysts, managers and Coordinators.

Access to Information Guidelines
Are produced by the Treasury Board Secretariat in support of the President of the Treasury Board as the designated Minister under the Act, as required by paragraph 70(1)(c) of the Act. The guidelines are intended to assist institutions in their day-to-day application of the Act, and are included in the Access to Information manual.

Access to Information Policy
Is produced by the Treasury Board Secretariat in support of the President of the Treasury Board as the designated Minister under the Act, and serves as the directives required by paragraph 70(1)(c) of the Act. The policy is meant to reflect the government's position concerning the interpretation and implementation of the Act, and is included in the Access to Information manual.

Alternative Service Delivery Organization (ASD)
An organization created by the federal government to deliver new or existing programs or services, including

- Service agencies (Special Operating Agencies, departmental service agencies, departmental corporations, branches or divisions of the public service similar to those listed under the *Financial Administration Act*, col. I, Schedule I.1);
- Crown corporations;
- administrative tribunals;
- shared governance corporations;
- partnership and collaboration with other sectors and levels of government; and
- the contracting-out of federal programs and services to the private and not-for-profit sector.

ATIPflow / ATIPimaging
Is a set of software programs designed to assist institutions in processing and tracking their ATI requests.

Best Practice
This term is used in this report to designate practices which the Task Force has found to be exemplary for the promotion of access to information and the effective processing of requests.

Cabinet Confidence
The rule of Cabinet confidentiality protects the principle of the collective responsibility of Cabinet while enabling ministers to engage in the full and frank discussions necessary for the effective functioning of a Cabinet system of government. The current Act does not apply to Cabinet confidences. Although it does not define Cabinet confidences, it does list examples of the types of documents which fall within this broad category (e.g. memoranda setting out proposals or recommendations for Cabinet, agenda of cabinet meetings, records of Cabinet decisions, draft legislation, communications between ministers on matters of government policy).

Co-ordination of Access to Information Requests System (CAIR)
The CAIR system is a number of common electronic facilities designed to support the ATI function across the government. These include a database containing a copy of all requests received by government departments and agencies, the capability to quickly search through the database for relevant information, and the capability to produce printed reports of information contained in the central database.

Deputy Head
Is a public servant who is the deputy minister for a department or ministry of state or, in any other case, the person designated to be the deputy head of the institution, and who has the general responsibility for the management of the institution.

Excluded Record
A record to which the Act does not apply.

Exemptions

– Class Test Exemption
A class test objectively describes the categories of information or documents to which an exemption can be applied. These exemptions describe classes of information that are considered sufficiently sensitive that disclosure of any information in the class could have a detrimental effect. Under class test exemptions, therefore, where a government institution is satisfied that information falls within the class specified, it can refuse access to the information.

– Discretionary Exemption
Discretionary exemptions are introduced by the phrase "the head of a government institution may refuse to disclose..." Where such exemptions apply to information requested under the Act, government institutions have the option to disclose the information where it is felt that no injury will result from the disclosure or where it is of the opinion that the interest in disclosing the information outweighs any injury which could result from disclosure.

– Injury Test Exemption
Exemptions based on an injury test provide that access to information requested under the Act may be denied if disclosure could reasonably be expected to be injurious to the interest specified in the exemption. In other words, disclosure of the information must reasonably be expected to prove harmful or damaging to the specific public or private interest covered by the exemption in order for access to be refused.

– Mandatory Exemption
Mandatory exemptions are introduced by the phrase "the head of the government institution *shall* refuse to disclose..." When information requested under the Act falls within a mandatory exemption, institutions normally must refuse to disclose the record. However, most mandatory exemptions provide for circumstances which permit disclosure if certain conditions are met (e.g. consent of the third party affected or if the information is publicly available).

Head
Is the Minister for a department or ministry of state or, in any other case, the person designated by order in council to be the head of the institution for the purpose of the Act.

Info Source
Is the publication produced by the designated Minister (President of the Treasury Board) in accordance with subsection 5(1) of the Act. It contains details of the organization, programs, functions and information holdings of government institutions.

Parliamentary Committee (The)
The House of Commons Standing Committee on Justice and Solicitor General which reviewed the *Access to Information Act* and the *Privacy Act* and produced a report on the two Acts entitled *Open and Shut* in 1987.

Program Officials
Are the employees of government institutions who work in the areas that develop or deliver government programs, and that are the subject of an access request.

Record
Means any information contained in any physical medium which is capable of preserving such information and includes any information contained in the original and any copy of correspondence, memoranda, forms, directives, reports, drawings, diagrams, cartographic and architectural items, pictorial and graphic works, photographs, films, microforms, sound recordings, video-tapes, video-disks and video-cassettes, punched, magnetic and other cards, paper and magnetic tapes, magnetic disks and drums, holographs, optic sense sheets, working papers, and any other documentary material, including drafts, or electromagnetic medium, regardless of physical form and characteristics.

Also, for purposes of the Act, a record includes a machine readable record which does not exist but which can be produced from an existing machine readable record using computer hardware and software and technical expertise normally used by the institution (see sub-section 4(3) of the Act).

Schedule I of the Act
The schedule to the Act which lists all of the government institutions which are subject to the *Access to Information Act*.

Schedule II of the Act
The schedule to the Act which, for the purpose of the application of the exemption contained in Section 24 of the Act, lists the sections of other legislation which restrict the disclosure of information.

Schedule I of the Regulations
The schedule to the Regulations which lists all of the investigative bodies which have the authority to claim an exemption under paragraph 16(1)(a) of the Act.

Severability
Is the requirement that the institution disclose any part of a record that does not contain exempted information which can reasonably be severed from the exempted information (Section 25 of the Act).

Third party
Means any person, group of persons or organization other than the person that made the request or a government institution listed in Schedule I of the Act; normally a third party may be involved in a request because the information which is the subject of a request was created by the third party and/or provided to the government institution by the third party.

Thirty-year rule
Prior to the enactment of the *Access to Information Act*, there was a Cabinet directive which required that all records that did not fall into a list of exceptions be open to public disclosure thirty years after their creation.

Annex 4

Research Papers Prepared for the Task Force

The Research Papers are cited by number in the Report. They are found on the accompanying CD-ROM.

Governance Context

1. Luc Juillet, Gilles Paquet, *Information Policy and Governance*
2. Neil Nevitte, *Citizens' Values, Information and Democratic Life*
3. Colin J. Bennett, *Globalization and Access to Information Regimes*
4. Ken Kernaghan, *Ministerial Responsibility: Interpretations, Implications and Information Access*
5. Guy Corriveau, *Trust Within and Among Organizations As It Relates to the Access to Information Framework*
6. Mary Franceschet, *Public Accountability and Access to Information*
7. John McDonald, Christine Ardern, *Information Management and Access to Information – A View into the Future*
8. Paul Attallah, Heather Pyman, *How Journalists Use the Federal Access to Information Act*
9. National Archives of Canada, *The Access to Information Act and Record-Keeping in the Federal Government*
10. Gladys Symons, *Constructing a Culture of Access in the Federal Public Service*
11. Consulting and Audit Canada, *Review of Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation*

Scope of the Act

12. Jerry Bartram, *The scope of The Access to Information Act – Developing consistent criteria for decisions respecting institutions*
13. Jerry Bartram, *Maintaining the Public Right of Access to Information when Service Delivery Models Change*
14. Christine M. Ardern, *Transitory Records – A Review*
15. Christine M. Ardern, *The Meaning of "Published" for Purposes of the Access to Information Act*

16. Murray Rankin & Associates, *Section 24 and Schedule II of the Access to Information Act – Statutory Prohibition against Disclosure – Options for Reform*
17. Barbara A. McIsaac, *The Nature and Structure of Exempting Provisions and the Use of the Concept of a Public Interest Override*
18. David R. Stephens, *Advice or Recommendations – Section 21 of the Access to Information Act*
19. Murray Rankin, Kathryn Chapman, *Third Party Provisions*
20. Wesley K. Wark, *The Access to Information Act and the Security and Intelligence Community in Canada*
21. Hamar Foster, Catherine Parker, Murray Rankin, Mark Stevenson, *Selected Concerns of Aboriginal People*

Access Process in the Act

22. Yvon Gauthier Inc., *Survey of Access to Information Units in Government Institutions*
23. Elizabeth Denham, *Issues and Options Regarding Fees under the Access to Information Act*
24. Goss Gilroy Inc., *An Analysis of Fees for Access to Information Requests*
25. David H. Flaherty, *Managing Response Times under Canadian Access to Information Legislation*
26. Robert Jelking, *Access to Information Act – Review of Administrative Limits*

Redress and Investigations

27. Paul Tetro, *Models for a Complaint/Redress System, Based on Features found in Other Access to Information Jurisdictions*
28. Barbara A. McIsaac, *The Information Commissioner Investigative Powers and Procedures*

Performance Reporting

29. Goss Gilroy Inc., *New Reporting Framework for Assessing the Performance of the Access to Information Program*

Annex 5

Select Bibliography

Articles

Bayne, Peter, "Recurring Themes in the Interpretation of the Commonwealth Freedom Of Information Act," (1996) 24:2 *Federal Law Review*. See: http://pandora.nla.gov.au/tep/11156

Gay, Oonagh, "Freedom of Information – The Continuing Debate" (June 16, 1999) *Research Paper 99/61*, House of Commons Library, London, UK.

Roberts, Alasdair, "Limited Access: Assessing the Health of Canada's Freedom of Information Laws," (April 1998) *School of Policy Studies*, Queen's University.

Roberts, Alasdair, "Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law," (2000) 60:4 *Public Administration Review*, 298.

Roberts, Alasdair, "Structural Pluralism and the Right to Information," (2001) 51:3 *University of Toronto Law Journal*, 243.

Roberts, Alasdair, Jonathan DeWolfe & Christopher Stack, "An Evidence-Based Approach to Access Reform," (July 2001) *School of Policy Studies Working Paper 22*, Queen's University.

Roberts, Alasdair, "Measuring Openness: Steps you can take so governments respect access laws," (Fall 1999) *Media Magazine*, 6.3

Roberts, Alasdair, "Is there a Double Standard on Access to Information?" (May-June 2002) *Policy Options Magazine*, 49.

Roberts, Alasdair, "New Strategies for Enforcement of the Access to Information Act," (Winter 2002) 27 *Queen's Law Journal* 647.

Snell, Rick, "Administrative Compliance – Evaluating the Effectiveness of Freedom of Information," (2001) 93 *Freedom of Information Review* 26.

Snell, Rick, "The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand," (2000) 28:3 *Federal Law Review*. See: http://pandora.nla.gov.au/tep/11156

Wilson, Ian, "Information, Knowledge, and the Role of Archives" (April 2001) 25:1 *Canadian Journal of Information and Library Science* 19.

Books

Drapeau, Col. Michel W. & Marc-Aurèle Racicot, *The Complete Annotated Guide to Federal Access to Information 2002*, (Toronto: Carswell, 2001).
Duplessis, Yvon & Jean Hétu, *Accès à l'information, Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, Indexée, annotée et commentée*, (Québec: Les Éditions Yvon Blais Inc, 1991).

Fortier, Louis, *Législation canadienne sur l'accès à l'information / Canadian Legislation on Access to Information*, (Toronto: Carswell, 1996).

McNairn, Colin & Christopher Woodbury, *Government Information: Access and Privacy*, with looseleaf supplements, (Toronto: Carswell, 1992).

McDonagh, Maeve, *Freedom of Information Law in Ireland*, (Dublin: Round Hall, Sweet & Maxwell, 1998).

Nevitte, Neil, *The Decline of Deference: Canadian Value Change in Comparative Perspective 1981-1990*, (Toronto: Broadview Press, 1996).

McDonald, A. & G. Terrill (eds), *Open Government: Freedom of Information and Privacy*, (London: Macmillan Press Ltd, 1998).

Guidelines

Government of Alberta, Freedom of Information and Protection of Privacy, "Guidelines and Practices: 2002 Edition." See: http://www3.gov.ab.ca/foip/guidelines_practices/2002/index.cfm

Government of British Columbia Ministry of Management Services, "FOIPPA Policy and Procedures Manual." See: http://www.mser.gov.bc.ca/foi_pop/manual/ToC.htm

Government of Manitoba, "FIPPA Resource Manual." See: http://www.gov.mb.ca/chc/fippa/manuals/resourcemanual/index.html.

Government of Ontario, Management Board Secretariat, Information and Privacy Office, "Manual." See: http://www.gov.on.ca/MBS/english/fip/manual.html.

Justice Canada, "Annotated Access to Information Act," Information Law and Privacy Section (Ottawa: Queen's Printer of Canada, current as of September 30, 1999). See: http://www.justice.gc.ca/ilap_e/Products/Annotated/ATIA/atia_annotated.htm

Treasury Board Secretariat, "Treasury Board Manual – Access to Information," (Ottawa: Queen's Printer of Canada, 1993). See: http://www.tbs-sct.gc.ca/Pubs_pol/gospubs/tbm_121/siglist_e.html

U.S. Department of Justice Office of Information and Privacy, "Freedom of Information Act Guide & Privacy Act – Overview" (Washington: U.S. Government Printing Office, May 2000). See: http://www.usdoj.gov/04foia/04_7.html

Reviews/reports

Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982, ALRC Report 77* (Canberra: Commonwealth of Australia, 1995).

Australian Law Reform Commission, *Australia's Federal Record: A Review of the Archives Act 1983*, ALRC Report 85 (Canberra: Commonwealth of Australia, 1998).

British Columbia Legislative Assembly, Third Session - 36th Parliament, *Special Committee to Review the Freedom Of Information & Protection Of Privacy Act*, (July 15, 1999). See: http://www.legis.gov.bc.ca/cmt/36thParl/foi/1999/review_act.htm

Canadian Centre for Management Development, *A Strong Foundation, Report of the Task Force on the Public Service Values and Ethics* (Ottawa: Queen's Printer of Canada, 2000). See: www.ccmd-ccg.gc.ca

Flaherty, David, F*our-Year Review of the Freedom of Information and Protection of Privacy Act by a Special Committee of the Legislative Assembly of British Columbia*, (Vancouver: Office of the Information and Privacy Commissioner for British Columbia, February 24, 1998). See: http://www.oipcbc.org/publications/other/review.html

Government of Alberta, Freedom of Information and Protection of Privacy, *Annual Reports and Statistics*. See: http://www3.gov.ab.ca/foip/annual_reports/index.cfm

Government of Canada, *Access and Privacy – The Steps Ahead* (Ottawa: Queen's Printer of Canada, 1987).

Government of Newfoundland and Labrador, The Freedom of Information Review Committee, *Striking the Balance – The Right to Know & the Right to Privacy - Vol. 1: Report, Vol. 2: Written Submissions*, (St. John's, The Queen's Printer, July 2001).

Hazell, Robert, *Freedom of Information in Australia, Canada and New Zealand – Final Report to the Cabinet Office on the Operation of the Australian Freedom of Information Act 1982, Canadian Access to Information and Privacy Acts 1982 and the New Zealand Official Information Act 1982* (London: Home Office, 1987).

Hazell, Robert, F*reedom of Information in Canada – Report to the Cabinet Office (M P O) on the Operation of the Access to Information and Privacy Legislation in Canada* (Ottawa, Treasury Board of Canada, August 1987).

Information Commissioner of Canada, *The Access to Information Act: 10 Years On* (Ottawa: Minister of Public Works and Government Services Canada, 1994). See: http://www.infocom.gc.ca/publications/default-e.asp

Information Commissioner of Canada, *Annual Report 1999-2000* (Ottawa: Minister of Public Works and Government Services Canada, 2000). See: http://www.infocom.gc.ca/reports/default-e.asp

Information Commissioner of Canada, *Annual Report 2000-2001* (Ottawa: Minister of Public Works and Government Services Canada, 2001). See: http://www.infocom.gc.ca/reports/default-e.asp

Information Management & Economics Inc., *Information Technology and Open Government* (Toronto: Minister of Public Works and Government Services, 1994). Report prepared for the Information Commissioner of Canada. See: http://www.infocom.gc.ca/publications/default-e.asp

Law Commission of New Zealand, *Review of the Official Information Act 1982*, NZLC Report 40, (Wellington, 1997). See: http://www.lawcom.govt.nz/

Legislative Assembly of Alberta, *Final Report of the Select Special Freedom of Information and Protection of Privacy Act Review Committee*, (1999). See: http://www.assembly.ab.ca/pro/FOIP/report1.htm

MPs' Committee on Access to Information, *A Call for Openness*, Ottawa (November 2001).

New Zealand Office of the Ombudsmen, *Ombudsmen's Practice Guidelines Nos.1 to 10.* http://www.ombudsmen.govt.nz/publicat.htm

Office of the Information Commissioner of Ireland, *Annual Report 1999*. See: http://www.irlgov.ie/oic/report99/pub.htm

Office of the Information Commissioner of Ireland, *The Freedom of Information Act – Compliance by Public Bodies, July 2001*. See: http://www.gov.ie/oic/235e_3c2.htm

Office of the Information Commissioner Western Australia, *Annual Report 1999-2000.*

Report of the Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act and the Privacy Act, Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer of Canada, 1987).

Roberts, The Hon. John, *Legislation on Public Access to Government Documents – The Green Paper* (Ottawa: Minister of Supply and Services Canada, 1977).

RPG Information Services Inc., *The Access to Information Act and Cabinet Confidences – A Discussion of New Approaches* (Ottawa: Minister of Public Works and Government Services Canada, 1996). Report prepared for the Information Commissioner of Canada. See: http://www.infocom.gc.ca/publications/default-e.asp

Sysnovators Ltd., *The Access To Information Act: A Critical Review* (Ottawa: Minister of Public Works and Government Services, 1994). Report prepared for the Information Commissioner of Canada. See: http://www.infocom.gc.ca/publications/default-e.asp

Treasury Board Secretariat, *Access to Information and Privacy Coordinators: Their Status and Role* (Ottawa: Queen's Printer, 1988).

United Kingdom, *Your Right to Know – The Government's Proposals for a Freedom of Information Act*. The White Paper presented to Parliament by the Chancellor of the Duchy of Lancaster by Command of Her Majesty, (London, December 1997). See: http://www.archive.official-documents.co.uk/document/caboff/foi/foi.htm

United Kingdom, Select Committee on Public Administration, *Public Administration Third Report*, (London: House of Commons, 1999). See: www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/570/57002.htm

Speeches/papers presented

Loukidelis, David, "Is the Door Opening or Closing? Assessing the State of Access to Information in Canada." Keynote Presentation at the FOIP 2000 Conference, Edmonton, May 29, 2000. See: http://www.oipcbc.org/publications/speeches/speech_02.html

Mitchinson, Tom, "Public Interest" and Ontario's *Freedom of Information and Protection of Privacy Act*," February 16, 2001. See: http://www.ipc.on.ca/english/pubpres/speeches/tm021601.htm

Reid, The Hon. John M., Information Commissioner of Canada, "Remarks to Conference on Access to Information Reform" Ottawa, May 1, 2000. See: http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=14

Reid, The Hon. John M., Information Commissioner of Canada, "Notes for Speech to ADM Advisory Committee" Ottawa, February 23, 2001. See: http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=8

Reid, The Hon. John M., Information Commissioner of Canada, "Remarks to ATI External Advisory Committee" Ottawa, June 26, 2001. See: http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=58

Roberts, Alasdair, "Reform of the Access to Information Act," Statement to the MPs' Committee on Access to Information, Ottawa, August 29, 2001. See: http://www.maxwell.syr.edu/campbell/library.htm

Roberts, Alasdair, "The Commissioner as Regulator: Improving Strategies for Enforcement of the Access to Information Act," Campbell Public Affairs Working Paper. Presented at "Independence and Responsibility: A Conference on the Officers of Parliament," University of Saskatchewan, November 2-3, 2001. See: http://www.maxwell.syr.edu/campbell/library.htm

Segal, Hugh, "The Critical Role of Information in a Democracy – A New Approach to Public Disclosure," Access to Government and Corporate Information Conference, University of Winnipeg, May 2002.

Snell, Rick, "Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand." Paper presented at Conference on *Freedom of Information – One Year On*, St. Patrick's Hall, Dublin, Ireland, April 1999. See: http://www.ucc.ie/ucc/depts/law/foi/conference/snellframes99.html

Wilson, Ian, "You Must Remember This." Presented to "Managing Information: As A Public Asset in the Public Interest" a Round Table series convened by the Institute on Governance, University of Ottawa, March 9, 1999.

Wilson, Ian, "Government and Information in the E-World." Presented to the 3rd Annual ATIP Conference, Ottawa, November 1, 2001.

Annex 6

Task Force Mandate

The interdepartmental Task Force will conduct a thorough administrative and general legislative review, identify possible adjustments for immediate implementation and report on further recommendations.

The Task Force will examine all components of the Access to Information framework, including the *Access to Information Act and Regulations*, the Policy and Guidelines on Access to Information, departmental procedures and certain aspects of federal government information management and dissemination, to ensure that the Act and its administration are as effective as possible.

The scope of the review of the administration of the Act would include:

- Review of the Access Regulations to allow for increased efficiency, and the TBS Access to Information policy and guidelines to provide additional guidance and support to the public servants charged with responsibility for administering the Act;
- An examination of the resourcing of ATI offices and consideration of the need for resourcing guidelines;
- An examination of the impact on ATI of electronic information and consequential adjustments;
- An examination of the processes and systems used in departments for responding to requests; and
- The identification and recommendation of initiatives to increase the amount of information available through informal means.

The scope of the review of the Act would cover the review and development of proposals for amendment of the *Access to Information Act* for consideration in the next mandate, including (but not limited to):

- Scope of the coverage of the Act;
- New or revised definitions;
- Revision of exclusions and exemptions;
- Review of the fee structure;
- Review of the role of the Information Commissioner; and
- Issues identified in the course of the administrative review.

1.5

Membership

Andrée Delagrave, Chair
TREASURY BOARD SECRETARIAT

Mary Anne Stevens
TREASURY BOARD SECRETARIAT

Sherry Moran
PRIVY COUNCIL OFFICE

Bruce Mann
DEPARTMENT OF JUSTICE

Stephen Bindman
DEPARTMENT OF JUSTICE

Marta Khan
NATIONAL ARCHIVES CANADA

Bruce Walton
NATIONAL ARCHIVES CANADA

Eric Miller
TREASURY BOARD SECRETARIAT

Donald Lemieux
DEPARTMENT OF JUSTICE

Shauneen Furlong
DEPARTMENT OF FINANCE

Valerie Lasher
DEPARTMENT OF JUSTICE

David Dunbar
LEGAL SERVICES UNIT
CITIZENSHIP AND
IMMIGRATION

Louis Alberti
LEGAL SERVICES UNIT
DEPARTMENT OF FOREIGN AFFAIRS
AND INTERNATIONAL TRADE

John McCarthy
DEPARTMENT OF JUSTICE
GOVERNMENT OF NEWFOUNDLAND
AND LABRADOR

The Task Force would like to acknowledge the contributions of several individuals to its work and the preparation of this report, in particular: Diana Babor, Helen Berry, Soulette Gray, Dave Stephens, Marjorie Ward, Chantal Scarlett, Leaman Long, Dola Rivet, Carmen St. Pierre and Geneviève Godin.

Annex 7

Advisory Committees Membership

External Advisory Committee

Dean Beeby
Bureau Chief
Canadian Press
Halifax, Nova Scotia

Norman Hillmer
Professor of History
Carleton University
Ottawa, Ontario

Aldéa Landry, Q.C.,
President
Landal Inc.
Moncton, New Brunswick

Wayne MacDonald
Project Manager
Access & Privacy Admin. Certificate
University of Alberta
Edmonton, Alberta

Paul-André Comeau
Professor
École nationale d'administration publique
Montréal, Québec

Arthur Kroeger
Chancellor
Carleton University
Ottawa, Ontario

Gaétan Lussier
President
Gaétan Lussier et Associés
Brossard, Québec

Paul Thomas
Professor of Government
University of Manitoba
Winnipeg, Manitoba

Roger Tassé, Q.C.,
Gowling Lafleur Henderson
Ottawa, Ontario

Advisory Committee of Assistant Deputy Ministers

Joan Atkinson
Citizenship and
Immigration Canada

Chantal Bernier
Indian and Northern Affairs

Kristine Burr
Solicitor General
Canada

Brent DiBartolo
National Defence

Oonagh Fitzgerald
Privy Council Office

Lorenz Friedlander
Foreign Affairs and
International Trade

Denis Gauthier
Health Canada

Ross Hornby
Treasury Board Secretariat

Lee McDonald
National Archives of Canada

Stephen Rigby
Canada Customs
and Revenue Agency

Elizabeth Sanderson
Justice Canada

David Tobin
Industry Canada

Michael Wernick
Cultural Development
Canadian Heritage

Mark Goldenberg
Human Resources
Development Canada

Annex 8

Historical Background of Access to Information in Canada

Federal Government

In **April 1965** – NDP MP Barry Mather introduced the first freedom of information bill as a private member's bill. It died on the order paper. In each parliamentary session between 1968 and his retirement in 1974, he reintroduced identical legislation. Four times it reached Second Reading, but went no further.

In **1968** – The Report of the Task Force on Government Information, *To Know and Be Known*, formed the basis for much of the present *Access to Information Act.*

In **October 1974** – Conservative MP Ged Baldwin introduced a private member's bill, Bill C-225, *An Act Respecting the Right of the Public to Information Concerning Public Business.* Though it eventually died on the order paper, it received extensive study by the Standing Joint Committee on Regulations and Other Statutory Instruments, which heard testimony from academics, the media, public servants, parliamentarians and public rights advocates. It tabled a report approving in principle the concept of freedom of information legislation.

In **June 1977** – The Liberal Government tabled a Green Paper on freedom of information: *Legislation on Public Access to Government Documents.* It was referred to the Standing Joint Committee on Regulations and Other Statutory Instruments which tabled its report in June 1978, suggesting substantial changes.

In **January 1979** – Secretary of State John Roberts announced the government's intention to introduce legislation but the May 22 election prevented this.

In **October 1979** – The Conservative government introduced freedom of information legislation, Bill C-15. It received Second Reading and was referred to the Standing Committee on Justice and Legal Affairs but died on the order paper.

On **July 17, 1980** – Liberal Communications Minister Francis Fox introduced Bill C-43 containing both the present *Access to Information Act* and *Privacy Act.* The Bill passed Second Reading and was sent to committee for study in the fall of 1980.

In **December 1981** – the government pulled the bill back for further study because several provincial attorneys-general had expressed concerns about certain provisions.

On **February 12, 1982** – Minister Fox told the Commons he might withdraw the bill and replace it with a uniform FOI Act for all 11 governments, which the provinces favoured. On March 21st he said that the government was now considering three options – passing the bill as it was, softening it to reflect provincial concerns or scrapping it entirely in favour of a uniform bill for all 11 jurisdictions. On April 8, 1982 – NDP Justice critic Svend Robinson released a letter to show there was no uniform provincial position – six provinces were opposed to the idea of uniform legislation. Only Ontario, PEI and Saskatchewan were in favour.

On **May 1, 1982** – Prime Minister Trudeau expressed new reservations about the effect of the Bill on the secrecy of cabinet minutes due to recent court decisions. On May 18, 1982 – Several FOI lobby groups held a press conference to urge the government to get the Bill back on track. The same day, all three parties agreed to pass the Bill by the end of June by limiting all stages of debate to one day. On May 20, 1982 – Cabinet approved a new version of C-43, with the major amendment that cabinet documents would not be covered and the court review power would not extend to Cabinet records. The opposition parties gave cautious approval.

On **June 9, 1982** – After a marathon one-day session, the Justice Committee approved the Bill, and on June 28, 1982, the Bill passed Third Reading in the House of Commons by a 193-21 margin.

On **July 1, 1983** – Bill C-43 was proclaimed in force. Both the *Access to Information Act* and the *Privacy Act* required a comprehensive review by a Parliamentary Committee, to begin within three years of enactment.

In **March 1987**, The Standing Committee on Justice and Solicitor General released its review of the Act, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. Later the same year, the Government released its response, *Access and Privacy: The Steps Ahead*. Subsequently most of the administrative recommendations of the committee report were implemented, but none of the legislative recommendations.

In **November 1998** – In the wake of the Somalia Affair and the Tainted Blood Scandal, a private member's bill introduced by Liberal MP Colleen Beaumier was passed, adding section 67.1 to the Act to make it an offence for anyone to destroy, falsify or conceal a record, or to counsel anyone else to do so. The offence is punishable by a maximum of two years in prison or a fine up to $10,000.

In **June 2000** – A private member's bill introduced by Liberal MP John Bryden to overhaul the Act was defeated at second reading by a vote of 178 to 44.

On **August 21, 2000** – Justice Minister Anne McLellan and Treasury Board President Lucienne Robillard announced the establishment of the Access to Information Review Task Force, with a mandate to review both the legislative and administrative issues relative to access to information.

On **November 28, 2001** – Bill C-36, the "Anti-terrorism Bill" was passed amending the *Access to Information Act*. Bill C-36 was granted Royal Assent on December 18, 2001.

Provincial Governments

Alberta

1994 – The *Freedom of Information and Protection of Privacy Act* was proclaimed in part, with the remainder in 1995. Originally based on the Saskatchewan Act, it borrowed many provisions from the BC Act.

1999 – A statutory legislative review of the Act by an all-party committee resulted in a number of amendments, including the repeal of the provisions in the *Municipal Government Act* relating to access and privacy and extension of the FOIP Act to post-secondary institutions and local government bodies. This Act is subject to a legislative review every three years.

2002 – The new Revised Statutes of Alberta, proclaimed in force as of January 1, 2002, consolidate Alberta Acts, and amendments to them, up to December 31, 2000. As well, the Select Special Freedom of Information and Protection of Privacy (FOIP) Act Review Committee, an all-party committee, was established to seek public input and make recommendations on any needed changes to the FOIP legislation. A final report will be submitted to the Alberta Legislature in the fall of 2002.

British Columbia

1993 – The *Freedom of Information and Protection of Privacy Act* was proclaimed on October 4, 1993, applicable to government ministries, agencies, and Crown corporations.

1994 – The application of the Act was extended to include public bodies at the local level such as schools, school boards, police forces, hospitals, colleges, and universities.

1995 – The Act was further extended to include all self-governing professional bodies, such as the Law Society of British Columbia, the College of Physicians and Surgeons, and the British Columbia College of Teachers.

1999 – A committee of the Legislative Assembly completed a legislative and administrative review on June 15, 1999.

2002 – On April 11, 2002, Royal Assent was given to amendments based on recommendations of the 1999 all-party special committee. These allow for new public bodies to be automatically added and for a strengthening of the capacity of the Commissioner to deem some requests as inappropriate. A legislative review is now to be held every six years.

Manitoba

1985 – The *Freedom of Information Act* was adopted, and came into force in 1987. It applied only to the provincial government and its agencies.

1997 – The original Act was replaced with the *Freedom of Information and Protection of Privacy Act*, which applies to local public bodies (such as municipal governments, universities and school divisions) and regional health authorities (including hospitals and personal care homes).

2000 – The government announced its intention to extend FIPPA to all local public bodies.

2002 – A review of the Act will proceed in 2002. It is scheduled to be completed in May 2003 at the latest.

New Brunswick

1980 – The *Right to Information Act* came into force.

1995 – The Act was extended (as of July 1, 1996) to include school boards and hospital corporations.

Newfoundland

1982 – The *Freedom of Information Act* came into force.

December 2000 – The government announced a review of the Act, giving the task force six months to report.

July 2001 – The Freedom of Information Review Committee released its report entitled: "Striking the Balance, The Right to Know & the Right to Privacy."

November 2001 – The recommendations of the Committee are implemented by the enactment of new legislation that includes the establishment of a Citizen's Representative to investigate and mediate complaints and make recommendations. The new *Access to Information and Protection of Privacy Act* will provide limited protection for cabinet materials and introduce a public interest override to require the release of protected records in the interest of public health and safety.

March 2002 – The *Access to Information and Protection of Privacy Act* was granted Royal Assent.

Nova Scotia

1977 – A freedom of information law was enacted, the first in Canada.

1994 – The original statute was replaced by the *Freedom of Information and Protection of Privacy Act* which came into force on July 1, 1994. The Act does not apply to municipalities, school boards, health care institutions, colleges and universities.

2002 – The Law Amendments Committee decided to increase the fees to $25.00 for an application, $25.00 for a review and $30.00 an hour for processing.

Ontario

1988 – The F*reedom of Information and Protection of Privacy Act* came into effect January 1, 1988. This Act has undergone several three-year reviews, however, few of the resulting recommendations have been implemented.

1991 – The *Municipal Freedom of Information and Protection of Privacy Act* came into effect January 1, 1991.

1996 – The Act was amended to remove employment records of civil servants from coverage and to provide for a $5 application fee and a $25 complaint fee.

Prince Edward Island

Spring 2001 – Bill No. 47, *Freedom of Information and Protection of Privacy Act* (No. 2), received Royal Assent on Tuesday, May 15, 2001. Proclamation is pending.

Québec

1982 – The *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information* was adopted. It applies to both records and the personal information holdings of the provincial, regional, municipal and local governments. The Commission d'accès à l'information must table a status report every five years.

1997 – The Commission's five-year status report was tabled.

2001 – The Act was amended by the adoption of the *Act to establish a legal framework for information technology* in June 2001.

Saskatchewan

1992 – The *Freedom of Information and Protection of Privacy Act* was proclaimed on April 1, 1992.

1993 – The *Local Authority Freedom of Information and Protection of Privacy Act* applies to information possessed or controlled by a local authority, such as a municipality, board of education, hospital or special care home.

The Northwest Territories/Nunavut

1996 – The *Access to Information and Protection of Privacy Act* (1994) came into force on December 31, 1996.

April 1, 2000 – Nunavut adopted the laws of the Northwest Territories until such time as it replaces those laws with its own.

Yukon Territory

1996 – The *Access to Information and Protection of Privacy Act* was proclaimed on July 1, 1996. All Yukon Territorial Government departments, agencies, boards, commissions, and corporations are subject to the Act.